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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of New York [New York County].

BRIEF FOR RESPONDENTS

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480. 39

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ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDRO-PRESS HANDELS, A. G., a Liechtenstein corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK [NEW YORK COUNTY].

BRIEF FOR RESPONDENTS.

I.

Statement Under Rule XXVII.

1. The opinion of the Court of Appeals of the State of New York (R. 109) is unreported. The Appellate Division,

First Department, wrote no opinion, but its memorandum decision (R. 104) is reported in 254 App. Div. 844 (1938). The opinion of the Trial Justice in the Supreme Court, New York County (R. 86), is not officially reported, but is reported in New York Law Journal, October. 15, 1937, page 1164, and in 6 N. Y. Supp. (2d) 334 (1938).

2. The judgment of the Supreme Court, New York County (R. 114), was entered January 12, 1939, pursuant to order (R. 11) made upon the remittitur of the Court of Appeals (R. 109) filed January 12, 1939. The petition for a writ of certiorari was filed January 13, 1939, and was granted January 16, 1939 (R. 116; ... U. S. ...).

3. The statute involved is Public Resolution No. 10, 73rd Congress, approved June 5, 1933, H. J. Res. 192, 48 Stat. 112, Title 31, U. S. C. 463. A copy thereof is annexed hereto, marked Appendix "A."

Statement of the Case.

1. In May, 1912, Petitioner, Bethlehem Steel Company, a Pennsylvania corporation (R. 7) (hereinafter sometimes called "Bethlehem"), issued and delivered a series of bonds known as its First Lien and Refunding Mortgage 5% Thirty-Year Gold Bonds, dated May 1, 1912, and due May 1, 1942 (hereinafter sometimes called "Bonds") (R. 7, 27, 70). Said Bonds provided for payment, at the option of the holder, in the City of New York, U. S. A., of one thousand dollars, or in London, England, two hundred five pounds, fifteen shillings, three pence sterling, or in Amsterdam, Holland, two thousand four hundred ninety guilders, and for payment of interest thereon in said respective currencies at the rate of 5% per annum upon presentation of the coupons annexed thereto (R. 7, 27-28).

2. The portion of the coupon bonds relevant to the issues upon this appeal reads as follows (R. 27):

"UNITED STATES OF AMERICA

COMMONWEALTH OF PENNSYLVANIA.

No. 00000	No. 00000
$1,000 U. S. Gold	$1,000 U. S. Gold
or	**or**
£205.15.3 Stg.	£205.15.3 Stg.
or	**or**
2,490 Guilders	2,490 Guilders

BETHLEHEM STEEL COMPANY

First Lien and Refunding Mortgage Five Per cent. Thirty-Year Gold Bond.

Series A.

Bethlehem Steel Company (hereinafter called the Company), for value received, hereby promises to pay to the bearer, or if registered, to the registered holder of this bond, on the first day of May, 1942, in the City of New York, U. S. A., One Thousand dollars, **or** in London, England, Two Hundred and Five Pounds, Fifteen Shillings, Three Pence Sterling, ***or*** **in Amsterdam, Holland, Two Thousand Four Hundred and Ninety Guilders,** and to pay interest on said principal amount from May 1, 1912, **in said respective currencies,** at the rate of five per cent. per annum, semi-annually on the first day of May and the first day of November in each year, but only upon presentation and surrender, as they severally mature, of the coupons therefor hereto annexed. Payment of the principal and interest of this bond will be made at the office or agency of the Company in the Borough of Manhattan, in said City of New York, in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed on May 1, 1912, **or, at the option of the holder, at designated offices in said foreign cities and countries, respectively, at which it is expressed to be payable."** (Emphasis ours.)[1]

[1] All emphasis in this brief, unless otherwise noted, is ours.

3. The form of one of the coupons reads as follows (R. 30, 42-43):

"On the first day of May 1935 unless the Bond, hereinafter mentioned, shall have been called for previous redemption $25.00

BETHLEHEM STEEL COMPANY

will pay to bearer at its office or agency in the City of New York, U. S. A., Twenty-Five Dollars, United States Gold Coin, or in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold. Bond. £5.2.10 62.25 Guilders

$25.00 Series A No. M15401 No. 46

(signed)—B. H. Jones, Treasurer"

Some of the Bonds were in lesser denominations and the coupons were accordingly likewise for lesser amounts, but, inasmuch as the wording is otherwise identical (R. 12, 30), the detailed provisions of such Bonds and coupons of lesser denominations are not set out here.

4. Respondents are all non-resident foreign corporations, duly organized and existing under the laws of the Principality of Liechtenstein, in Europe, and of The Netherlands (Holland), in Europe (R. 7, 13, 18, 24, 41, 75).

5. Respondents are the owners of Bonds and coupons as set forth in the amended complaint (R. 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 23, 25; see also Schedule III, R. 91 *et seq.*) and in the principal moving affidavit (R. 45, 46, 48, 49, 50).

6. Respondents duly elected to demand and receive, with respect to all of the coupons sued upon, the specific number

of guilders in Amsterdam, Holland (R. 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 23, 25; R. 45, 47, 48, 49), set forth in the coupons (viz., 62.25 guilders in the case of the typical coupon), but Petitioner refused to pay said coupons in Amsterdam, Holland, in accordance with such demands (*id.*); see, also, particularly, typical forms of protest, R. 88-89; 89-90).

7. The amended answer alleges (R. 40) Petitioner's willingness to pay in money of the United States *in the City of New York* the sum of $25 in respect of each typical coupon (being neither the foreign place of payment nor the foreign currency set forth in the coupons and chosen by these foreign Respondents), and specifically admits the non-payment of the amounts sued for (R. 31, 32, 33, 34, 35, 36, 37).[2]

8. When the Bonds were originally offered for sale in the United States, "simultaneous but entirely separate and distinct offerings were made in London and in Amsterdam" (R. 44, 71, 76, 78) "thus" (according to the offering circular) "assuring an international market" (R. 44, 76).

The offering circular, upon the original sale of the Bonds in Holland, was in the Dutch language (R. 81). In the offering circular the statement was made that application would be made to list the issue on the New York Stock Exchange and, if deemed desirable, on one or more foreign exchanges (R. 77); and, in fact, the Bonds were originally listed on the New York, London and Amsterdam Stock Exchanges and at the time the principal moving affidavit was made (May 17, 1937) were mainly traded in in Amsterdam (R. 55-56).

The purpose of providing for payment of the interest on and the principal of such Bonds in foreign currencies abroad

[2] After the amended answer was served, the parties stipulated for the deposit of the coupons with Petitioner's representative, and certain payments were made by Petitioner to Respondents to be credited on account of any judgment to be rendered herein (Stipulation omitted in printing, R. 87).

was as follows (see letter dated January 11, 1934, written in behalf of Petitioner to the New York Stock Exchange [R. 44, 58]):

> "* * * to facilitate their sale and distribution in such countries by enabling residents of such countries who might purchase any of such bonds to collect such interest and principal at the respective maturity dates **in such countries and in the currencies of such countries in specified amounts**" (R. 44, 58).

In said letter of January 11, 1934, the following representation was also made:

> "In accordance with such purpose we made or will make provision whereby owners of such bonds residing in foreign countries upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof in such countries and in the currencies of such countries in the amounts specified in such coupons for such countries."

Under date of August 7, 1934, the last-mentioned representation was retracted and it was announced that payment to foreigners in foreign currencies abroad would be refused unless certain conditions, not specified in the coupons or in the Bonds or in the Indenture securing the same, were complied with (see R. 52, 59), the effect of which would have been to make the coupons non-negotiable, despite the specific language in the Bond itself that the coupons should be transferable by delivery merely, and should be negotiable (even if the coupon bonds were to be registered as to principal) (R. 29). The further effect was to pay guilders to certain foreign holders abroad and not to others.

9. The question of the applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency coupons has heretofore been litigated and adjudicated between Petitioner and two of the Respondents herein (Anglo-Continentale Treuhand, A. G. [hereinafter called "Anglo"] and Mondiale Handels-und Verwaltungs, A. G.

[hereinafter called "Mondiale"]). Such adjudication was had in a suit brought by said two Respondents entitled "Mondiale Handels-und Verwaltungs, A. G. and Anglo-Continentale Treuhand, A. G. against Bethlehem Iron & Steel Corporation" (which defendant has since been merged into this Petitioner, R. in No. 591, 8, 23) upon coupons similar to those here sued upon (and identical with those involved in No. 591), issued by Lackawanna Steel Company and assumed by Petitioner (Petitioner's Brief, p. 3). Said action was in the Supreme Court, New York County, Index No. 13406-1936, and is hereinafter for convenience referred to as the "First Action." The same issues of law and of fact were involved in the "First Action" as are involved at bar.

The judgment in the "First Action," in favor of said two Respondents, was entered on July 1, 1936, in the Supreme Court, New York County, pursuant to written opinion of Mr. Justice Hofstadter, reported in the New York Law Journal of June 13, 1936, page 3029.

Although notice of appeal was served by this Petitioner in the "First Action," the appeal was not prosecuted; the judgment in the "First Action" was paid in full, with interest, and is no longer appealable.

Mr. Justice Hofstadter's opinion in the case at bar appears at R. 86. In that opinion he took judicial notice of the "First Action," using the following language (R. 86):

> "Motion for summary judgment is granted. This court has already granted summary judgment on a similar state of facts. There is nothing contained in the recent decisions to warrant a result different from that reached by this court in the cases decided in June, 1936. Settle order."

As between Petitioner on the one hand and Respondents Anglo and Mondiale on the other hand, therefore, the applicability of the Joint Resolution to the multiple currency coupons is *res adjudicata* in favor of said Respondents.

No issue of fact is raised by the amended answer; only questions of law are presented on this appeal (R. 56).

The Questions Presented.

Petitioner has misconceived the questions presented upon this appeal, and has accordingly stated them incorrectly at page 2 of the petition herein.

The actual questions presented are as follows:

(1) Does the Joint Resolution of Congress of June 5, 1933 (48 Stat. 112, Title 31, U. S. C., Sec. 463),[3] operate to deprive Respondents, foreigners resident abroad, of the right, specifically granted to them, to demand and receive in Amsterdam, Holland, upon presentation of the coupons, the specific number of guilders (viz., 62.25 guilders, in the case of a typical coupon) specifically promised by Petitioner to be payable in said city upon such presentation?

(2) If so, is it (a) a constitutional exercise of the powers of Congress in respect of foreigners resident abroad or (b) an effectual or valid exercise of such powers?

(3) If Questions (1) and (2) be answered in the affirmative, should not the judgment below nevertheless be affirmed as to Respondents Anglo and Mondiale because the judgment of July 1, 1936, in the "First Action," constitutes *res adjudicata* between Petitioner on the one hand and said two Respondents on the other hand?

(4) Are not all Respondents, under the particular circumstances of this case (no proper tender having been made by Petitioner and no tender, if any be deemed made, having been kept good by it), in any event entitled to interest and costs?

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[3] Hereinafter sometimes called "Joint Resolution" or "Resolution."

II.

SUMMARY OF ARGUMENT.

POINT A.

This is not a "gold" or a "gold coin" or a "gold clause" case. The case involves the right of foreign coupon holders to exercise a separate and distinct alternative, specifically set forth in the coupons, to demand and receive specified amounts of foreign currencies, as specifically set forth in the coupons, in foreign places, likewise specifically designated in the coupons. No demand for (a) "gold," or (b) "a particular kind of coin or currency of the United States," or (c) "an amount in money of the United States measured thereby," was made by Respondents either in the United States or elsewhere. The amounts of foreign moneys are not dependent upon the dollar amount.

The case is a simple one in contracts, and the "gold clause" is not even remotely involved.

POINT B.

The Joint Resolution is not applicable to the coupons sued upon. It does not extend to provisions of instruments which give the obligee a right to require payment otherwise than (a) "in gold" or (b) in "a particular kind of coin or currency of the United States" or (c) "in an amount in money of the United States measured thereby"; nor does it extend to such instruments or obligations as are, or as become, payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the separate foreign money alternatives of the coupons sued upon.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies abroad remaining unaffected.

(3) The Joint Resolution can in no way affect a contract to be performed in another country in the lawful money of that country.

(4) Payment in guilders is not equivalent to payment in gold.

(5) Payment in guilders does not affect the equal parity of the dollars of the United States with each other.

(6) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right of foreigners, resident abroad, to demand and receive guilders in Holland. No public policy inhibits such payment.

(7) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the payments to foreigners abroad of the foreign money alternatives contained in the coupons sued upon.

(8) To hold that the foreign money alternatives contained in multiple currency clauses are condemned by the Joint Resolution would deprive these holders of these coupons of their property without due process of law in violation of the Fifth and Tenth Amendments.

(9) This Court's decision in the "Holyoke" Case supports our position.

(10) Decisions of Federal and State Courts construing the Federal statute here involved in relation to the foreign money alternatives in multiple currency clauses support our position.

(11) Respondents are foreigners, and the Joint Resolution does not purport to affect, and cannot affect, payments in foreign moneys to be made to foreigners abroad.

(12) Summary Statement showing non-applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses.

Point C.

(1) The place and medium of payment of the coupons were at the holder's option, and the obligor must discharge its indebtedness as the holder elects.

(2) An obligation in terms of the currency of a country takes the risk of currency fluctuations, and whether debtor or creditor profits, the law takes no account of it.

(3) As a result of Respondents' election, the law of the place of performance (Holland) governs, and under that law Respondents' choice of the medium of payment is legal.

(4) Respondents are entitled to recover in full, as held by the Court of Appeals, whether American or Dutch law be applied.

Point D.

The functional approach to Petitioner's interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

Point E.

Whatever may be the decision of this Court as to the general application of the Joint Resolution to foreign money alternatives contained in multiple currency clauses, the judgment appealed from should be affirmed as to Respondents Anglo and Mondiale.

(1) Respondents may urge all grounds for sustaining the judgment appealed from, whether or not raised by the petition.

(2) The Trial Justice properly took judicial notice of the "First Action."

(3) The judgment in the "First Action" is *res adjudicata* between Petitioner and Respondents Anglo and Mondiale.

(4) Irrespective of any decision by this Court as to the applicability of the Joint Resolution to the foreign money alternatives in the coupons, the judgment below should be affirmed as to Respondents Anglo and Mondiale. A supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation in whole or in part of the doctrine of *res adjudicata*.

Point F.

At all events, all Respondents are entitled to interest and costs.

Point G.

The basic fallacy of Petitioner's Brief is that Petitioner is trying to amend the Joint Resolution by inserting words and definitions not therein contained. It starts with a false premise (i. e., by assuming as a premise its erroneous conclusion that the Joint Resolution applies to the foreign money alternatives contained in multiple currency clauses), bolsters it with inapplicable reasoning, and thus reaches a fallacious conclusion (i. e., that the Joint Resolution applies to such foreign money alternatives).

No public policy or statute inhibits the payment sought at bar.

The judgment appealed from should be affirmed.

III.

ARGUMENT.

Preliminary Statement.

Counsel for Respondents herein has filed a motion with this Court for leave to file a brief as *amicus curiae* in *Guaranty Trust Company of New York, as Trustee, etc.* v. *Henwood, Trustee, etc., et al.*, October Term, 1938, No. 384, which last-mentioned case (followed by *Chemical Bank & Trust Co., etc.* v. *Henwood, Trustee, etc.*, October Term, 1938, No. 495, and by *Bethlehem Steel Co.* v. *Zurich General Accident & Liability Ins. Co.*, October Term, 1938, No. 590) has been assigned for argument prior to the instant case.

In view of the fact that Petitioner's joint brief in No. 590 and the case at bar frequently refers to No. 384 and to the brief of the petitioner in that case, we deem it relevant to point out certain differences between the aforesaid cases and the case at bar.

A. In respect of No. 384:

(1) Petitioner in No. 384 is the corporate trustee under the mortgage securing said bonds. Respondents in No. 384 contended before the District Court and before the Circuit Court of Appeals (8th) and in their joint brief to this Court in opposition to petition for writ of certiorari in No. 384, that the Joint Resolution is not really and truly involved in No. 384 (see said joint brief, pp. 7-8), and that the actual question involved is whether, inasmuch as the option to receive guilders "was specifically reserved to the holders of the bonds and was not conferred upon the mortgage trustee, the mortgage trustee may elect to take guilders in behalf of bondholders who have refrained from making such an election upon their own account and who have not authorized the mortgage trustee to make such an election for them."

One of the respondents in No. 384 urges the same point upon the appeal to this Court.

If, therefore, this Court should heed such arguments, the decision in No. 384 would not be relevant upon the issues in the instant case (No. 591).

(2) Petitioner in No. 384 is a domestic corporation, whereas at bar (No. 591) all Respondents are foreigners, resident abroad, and with no office or place of business within the United States. A holding as to the applicability of the Joint Resolution in No. 384, adverse to the petitioner in No. 384, would, therefore, not be decisive of the issues at bar. Respondents in No. 384 themselves recognize this in their briefs.

(3) An actual Dutch offering was made at bar (see R. 44, 71, 78, 81, 87), which seemingly may not have been the case in No. 384. This is a point upon which respondents in No. 384 rely heavily in their briefs.

(4) No. 384 arises in a reorganization proceeding. The Circuit Court of Appeals in that case apparently based its decision, in part at least, upon this circumstance (see 98 F. [2d] 160, at 165).

(5) In No. 384 no proof of Dutch law appears in the record in respect of alternative obligations, such as appears in the instant case (No. 591) at R. 51.

B. In respect of No. 495:

(1) Petitioner in No. 495 holds a registered bond, not containing multiple currency clauses, but exchangeable, by its terms, into coupon bonds containing such clauses. One of the respondents in No. 495 urges that the right to exchange registered bonds (without multiple currency clauses) into coupon bonds (with multiple currency clauses) lapsed upon the filing and approval of the petition in reorganization.

(2) Furthermore, in No. 495, the registered bond so held by petitioner therein is held as collateral merely, and one of the respondents in No. 495 urges that the right to take foreign currencies, if any (and assuming that the registered bond, without multiple currency clauses, is exchangeable after bankruptcy into coupon bonds, with multiple currency clauses), resides in the pledgor (the Railway Company and/or its Trustee) and not in the pledgee (the petitioner in No. 495).

If this Court should heed either or both of such arguments so advanced in No. 495, the decision in that case would therefore be inapplicable to the instant case (No. 591).

(3) Furthermore, in No. 495 no proof of Dutch law appears in the record in respect of alternative obligations, such as appears in the instant case (No. 591) at R. 51.

C. In respect of No. 590:

No. 590 involves the election to take Swiss francs in Switzerland. Inasmuch as Petitioner submits a joint brief in No. 590 and No. 591, it is pertinent to mention that Swiss law as to alternative obligations was not included in the record in No. 590; and if this Court should deem that the pertinent law of the place of performance in respect of alternative obligations is a necessary part of the record, it is conceivable that if any adverse result be reached by this Court in that case it may therefore not be decisive of the instant case (No. 591).

POINT A.

This is not a "gold" or a "gold coin" or a "gold clause" case. The case involves the right of foreign coupon holders to exercise a separate and distinct alternative, specifically set forth in the coupons, to demand and receive specified amounts of foreign currencies, as specifically set forth in the coupons, in foreign places, likewise specifically designated in the coupons. No demand for (a) "gold", or (b) "a particular kind of coin or currency of the United States", or (c) "an amount in money of the United States measured thereby",[4] was made by Respondents either in the United States or elsewhere. The amounts of foreign moneys are not dependent upon the dollar amount.

The case is a simple one in contracts, and the "gold clause" is not even remotely involved.

From a reading of Petitioner's brief it might be assumed that Respondents are arguing that the Joint Resolution does not apply to "gold clauses." Such is not the fact. Respondents readily acquiesce that the "gold clause" in the coupons was stricken by the Joint Resolution. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935) (hereinafter sometimes referred to as the "Norman" case).

What Respondents do contend is that, the "gold clause" having been stricken, the instrument must be read as though the words "lawful money" had appeared therein wherever the words "gold coin" now appear, and that all the resulting promise to pay lawful money and the separate promises to pay foreign currencies abroad remain unaffected.

This case does not involve any demand by Respondents, foreigners, for either (a) "gold" or (b) a "particular kind of coin or currency of the United States" or (c) "an amount in money of the United States Measured thereby."[4] No demand for any thereof was made by Respondents either in the United States or elsewhere.

Petitioner speciously argues that, because instruments containing provisions for payment in multiple currencies

[4] i. e., measured by "gold" or by a "particular kind of coin or currency of the United States."

may be or are included in the amount of "gold clause" bonds referred to in the *Norman* case, and because it was decided in *Compania de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N. Y. 22 (1935), cert. den. 297 U. S. 705 (1936), that a "gold clause" provision in a bond is discharged by payment of lawful money, these simple circumstances permit Petitioner to discharge the chosen foreign currency promise in the coupons by paying, to foreigners resident abroad, $25 in the United States instead of 62.25 guilders in Holland.

Such arguments miss the point.

In the *Norman* and *Inversiones* cases the transactions were purely domestic ones; the bonds were payable *in gold dollars only*, in New York; *there were no foreign money alternatives in the instruments;* no promises were made therein for payments of such foreign moneys abroad; and it was held in suits brought in the courts of the State of New York to enforce the "gold clause" provision of the bond, lawful money only could be recovered, but not the gold coin or its value.

The sole question in the *Norman* case is stated at page 243 of the report to be the "review of two decisions sustaining the power of Congress to invalidate **'gold clauses'** in private money contracts."

It is seen that the validity of the "gold clause" was the only question before the Court. **No question of multiple currencies was even remotely involved in the case,** and there was no holding that any other portion of the instrument was affected by the striking of the "gold clause" (see p. 29, *infra*).

To the extent that the coupons here sued upon provide for payment in gold coin, they come within the condemnation of the Joint Resolution as construed in the *Norman* and *Inversiones* cases—in other words, to the extent (but no more) that the coupons contain a provision for payment in gold coin, the obligation to pay lawful money is substituted for the obligation to pay gold coin. But this suit is brought under another limb of the instrument (the promise to pay guilders in Holland), and inasmuch as, and to the extent

that, the "gold clause" is not involved, neither the Joint Resolution nor the *Norman* case nor the *Inversiones* case apply.

All holders of the "gold clause" (including Respondents) are treated alike by the Joint Resolution,—i. e., the "gold clause" is stricken. In that respect Respondents, insofar as their bonds and coupons contain a "gold clause," are on a parity with the holders of every other "gold clause." But inasmuch as Respondents did not try to collect under the "gold clause," the separate promises to them to pay foreign moneys abroad are no more affected than if the contract were a simple promise to pay guilders in Holland.[5] (See brief of respondent Southern Pacific Co. in No. 384, where, at p. 21, it is admitted that a contract to pay foreign money only is enforceable; see also concession of Petitioner, in its reply brief to the Court of Appeals, quoted at p. 34, *infra*.)

As will be shown more fully later in Point B (4) (*infra*), Petitioner's contentions are without merit when it is realized that guilders are not "gold," nor a "particular kind of coin or currency of the United States,"[6] nor "an amount in money of the United States measured thereby."[6] Neither are guilders legal tender in the United States.

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[5] See *Petkus* v. *Lietuvos Ukio Bankas*, 123 Misc. (N. Y.) 193 (1924), where, in an action for rescission, the Court said at page 195:

> "The option which was afforded to him by the defendant as to the manner in which he might pay for the stock did not persist in the relations of the parties after the option had been acted upon by the plaintiff.
>
> "The accuracy of this conclusion is made apparent by considering a concrete situation which is not concerned with money. For instance, suppose the situation was one of primitive barter. Suppose A agreed to deliver an identified horse to B in exchange for either two identified cows or ten identified sheep. B has neither the sheep nor the cows but has other chattels with which he can obtain and does deliver the sheep. A later fails to deliver the horse as agreed. B elects to rescind the contract and makes a demand to that end. Before doing so the intrinsic value of the ten sheep which had an equivalent value to the two cows at the time of the agreement has depreciated. He, therefore, because A at one time was willing to accept the equivalent of the ten sheep in the form of two cows, demands that A give him back two cows. A never received the two cows, although he received their one time equivalent in value in sheep. It would be a patent absurdity to hold that a demand for the return of the cows, which had never been delivered by B to A, entitled B to damages based upon the value of the cows as at the date of the delivery of the sheep in an action *based on rescission*. Such a demand made by B upon A would inevitably be held not to be such a rescission as would sustain a cause of action set out on the theory of a disaffirmance of the contract. This illustration is precisely parallel to the facts involved in the complaint herein."

[6] i. e., measured by "gold" or by a "particular kind of coin or currency of the United States."

Petitioner's contentions might possibly have had a modicum of plausibility prior to 1857, in which year foreign coins were declared to be no longer legal tender.

But by Chapter LVI of the Laws of 1857, 11 Stat. 163—*"An Act relating to Foreign Coins and to the Coinage of Cents at the Mint of the United States"*—it was provided (so far as relevant here) as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
>
> * * * * * * * * *
>
> "Sec. 3. *And be it further enacted,* That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are hereby repealed; * * *."

The law in its present form is found in 31 U. S. C., Sec. 456; R. S., Sec. 3584.

It is therefore seen that, although guilders are not now and never were "coin or currency of the United States," even the quality of legal tender which foreign moneys might have had prior to that time was thereby destroyed. The value of foreign moneys for commercial purposes is established by the usage of merchants or the actual market value thereof (*Gunther* v. *Colin,* 3 Daly [N. Y.] 125 [1869]).

Foreign money (guilders), while money in Holland, is a mere commodity in the United States.

As was said in *Petkus* v. *Lietuvos Ukio Bankas,* 123 Misc. (N. Y.) 193, 197 (1924), when foreign money

> "* * * is the basis of the damage computation, the damages are fixed in the domestic legal tender equivalent of the value of foreign money or commodity (at the rate of exchange prevailing) at the time when, and the place where, the contract ought to have been performed. *Di Ferdinand* v. *Smits & Co.,* 11 Am. Law Reg. 358; *Ladd* v. *Arkell,* 8 J. & S. 150; *Guiteman* v. *Davis,* 3 Daly, 120, *Stewart* v. *Chambers,* 2 Sandf. Ch. 422; *Robinson* v. *Hall,* 28 How. Pr. 342; *King* v. *Hamilton,* 12 Fed. Rep. 478; 18 R. C. L. §17."

See, also: *Deutsche Bank* v. *Humphrey,* 272 U. S. 517, 521 (1926); *Restatement, Conflict of Laws,* Sec. 423; *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.,* 81 F. (2d) 11 (C. C. A., 2nd, 1936), cert. den. 298 U. S. 655 (1936) (hereinafter sometimes referred to as "St.

Louis Southwestern case"); *Hoppe* v. *Russo-Asiatic Bank*, 235 N. Y. 37 (1923); *Richard* v. *American Union Bank*, 241 N. Y. 163 (1925); *Kantor* v. *Aristo Hosiery Co., Inc.*, 222 App. Div. (1st Dept., 1928) 502, aff'd 248 N. Y. 630 (1928).

Coin and currency of the United States therefore enter this case only as the measure of the damages which Respondents are entitled to recover, and not otherwise.

Prior to the passage of the Joint Resolution the damages could have been awarded in gold coin, if the parties had specially contracted with reference to such currency, it being legal tender at that time; otherwise damages, even prior to the passage of the Joint Resolution, would have been awarded in legal tender without reference to or specification as to gold coin. *Bronson* v. *Rodes*, 74 U. S. 229, 254 (1868); *Butler* v. *Horwitz*, 7 Wall. 258 (1868); *Chrysler* v. *Renois*, 43 N. Y. 209 (1870); *Wild* v. *N. Y. & Austin Silver Mining Co.*, 59 N. Y. 644 (1874); *Greentree* v. *Rosenstock*, 61 N Y. 583, 590 (1875).

Since the passage of the Joint Resolution damages may no longer be awarded in gold coin, even though gold coin may have been contracted for, since gold coin is no longer legal tender. But, at bar, gold coin was never demanded nor are damages asked either in gold coin or for the value of gold coin. The suit is one merely for damages "in the domestic legal tender equivalent of the value of foreign money or commodity (at the rate of exchange prevailing) at the time when, and the place where, the contract ought to have been performed" (*Petkus* v. *Lietuvos Ukio Bankas*, *supra*, at p. 197).

The fallacy of Petitioner's premises is further demonstrated by the fact that damages are sought in lawful money only, and not (a) in "gold" or (b) in "a particular kind of coin or currency of the United States" or (c) in "an amount in money of the United States measured thereby": its premises falling, its conclusions likewise fall.

Approaching the analysis of the Joint Resolution with the foregoing general principles in mind, it will be clearly seen that the Joint Resolution does not and cannot affect the foreign money alternatives contained in the coupons sued upon.

POINT B.

The Joint Resolution is not applicable to the coupons sued upon. It does not extend to provisions of instruments which give the obligee a right to require payment otherwise than (a) "in gold" or (b) in "a particular kind of coin or currency of the United States" or (c) "in an amount in money of the United States measured thereby"; nor does it extend to such instruments or obligations as are, or as become, payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the separate foreign money alternatives of the coupons sued upon.

Where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding. *Fox* v. *Standard Oil Co.*, 294 U. S. 87 (1935). Such definitions are part of the law and are binding upon the courts. *Sutherland, Statutory Construction*, 2nd Ed., Vol. 2, pp. 684-685, 687.

The meaning of a statute must be sought in the language which it employs. *United States* v. *Standard Brewery*, 251 U. S. 210 (1920); *Lansdown* v. *Faris*, 66 F. (2d) 939 (C. C. A., 8th, 1933).

The Resolution, the text of which is set forth in Appendix "A" of this brief, is clear and unambiguous. The words "obligation" and "coin and currency" are defined in Section 1(b). By inserting the definitions wherever those words appear, the Resolution properly reads as follows (the definitions being inserted by us in brackets):

> "Every PROVISION contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment **in gold or a particular kind of coin or currency [of the United States]**, or in an amount

> in money of the United States measured thereby,[1] is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation [payable in money of the United States] hereafter incurred. Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts."

The scope of the Resolution is expressly limited to obligations and provisions thereof which are *payable in money of the United States.* The intention so to limit the Resolution appears in the preamble (the definitions also being inserted by us in brackets):

> "Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and
>
> "Whereas the existing emergency has disclosed that provisions of obligations [payable in money of the United States] which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby,[1] obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it * * *."

It is true that the word "obligation" is sometimes used generally to refer to an instrument. As used in the Resolution, however, the careful phrasing—"* * * any obligation hereafter incurred [clause 1(a), first sentence] and "Every obligation heretofore or hereafter incurred" [clause (a), second sentence]—can refer only to the duty or liability and not to the instrument itself. The instrument could not be "incurred." The duty or liability could be "incurred."

[1] i. e., measured by gold or by a particular kind of coin or currency of the United States.

In *American and English Encyclopedia of Law,* 2nd Ed., the word **"incur"** is defined as follows:

> "To incur means to become liable or subject to; to cause, occasion, bring on." (citing many cases and illustrations).

The word was so construed when used in a bond of indemnity given to a sheriff, in *Scott* v. *Tyler,* 14 Barb. (N. Y.) 202 (1852), aff'd upon appeal at Monroe Gen. Tm., March, 1853; when used in a guaranty agreement, in *Beekman* v. *Van Dolsen,* 70 Hun (N. Y.) 288 (App. Div., 1st Dept., 1893), where, incidentally, the word "obligation" is also used in the sense of a duty; in *Deyo* v. *Stewart,* 4 Denio (N. Y.) 101 (1847), where, at page 103, it construes the word as we construe it, when applied to a state statute; in *U. S.* v. *Distillery,* 11 Blatchf. (U. S.) 255, Fed. Case No. 14963, 25 Fed. Cas. 854 (C. C., S. D. N. Y., 1873), in construing a Federal statute.

Having thus considered the definition of the word "incurred" as used in the Joint Resolution, a consideration of the word "obligation" as used therein becomes pertinent.

"A contract," said Marshall, C. J., in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197 (1819),

> "is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the *obligation* of his contract."

Chief Justice Marshall's language was drawn from Article I, Section 10, of the Constitution of the United States, using the word "obligation" precisely as we use it here, providing that

> "No state shall pass any law impairing the *obligation* of contracts." [8]

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[8] The cases are legion in which the word is so used: *Fletcher* v. *Peck,* 6 Cranch. 87, 135, 137 (1810); *Ogden* v. *Saunders,* 12 Wheat. 212 (1827); *Von Hoffman* v. *City of Quincy,* 71 U. S. 535, 538 (1866); *Ochiltree* v. *Railroad Co.,* 88 U. S. 249, 252 (1874); *Walker* v. *Whitehead,* 83 U. S. 314, 317 (1872); *Hays* v. *Port of Seattle,* 251 U. S. 233, 237 (1929); *Shriver* v. *Woodbine Bank,* 285 U. S. 467, 478 (1932). See *Sutherland,*

This Court in the *Norman* case, at page 299, also used the word "obligation" precisely as we contend it should be used here when it referred (at p. 299) to the "obligation" to pay in gold coin (see footnote 11, p. 29, *infra*).

It now becomes pertinent to re-examine the definitions contained within the Joint Resolution itself and petitioner's contentions with respect thereto. The term "obligation" and the term "coin or currency" are defined in Section 1(b) as follows:

> "(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

The phrase "every obligation of and to the United States" makes clearer, if further clarification were required, that Congress intended to use the word "obligation" in the sense of duty and not in the sense for which Petitioner contends. The "obligation to" the United States must mean the duty or liability to it. It could not mean the instrument.

Petitioner argues at length that the term "obligation" should be given the restricted meaning of "instrument." It quotes a definition of the word "obligation" from Webster's Dictionary, stating that the only synonym used is "contract"; it fails to point out, however, that the word "contract" is used therein as a verb, not as a noun. In fact, the very definition (incompletely quoted by Petitioner) gives as illustrations: "to incur debt," etc.; "incur emphasizes the

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Statutory Construction, supra, Sec. 660, pp. 1189-1190, where the following language appears:

> "The federal constitution provides that no state shall pass any law impairing the *obligation* of contracts. The obligation of a contract is the law which binds the parties to perform their agreement. It is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."

See also the use of the word "obligation" in *Jackson* v. *United States*, 60 Ct. of Cl. 590 (1925), at page 37, *infra*.

idea of liability," etc.; "as, to incur an obligation," etc.—precisely as used in the Joint Resolution and as contended for by Respondents. The full definition (emphasis NOT ours) is appended in the footnote.* What Petitioner is trying to accomplish is to inject into the Resolution words and meanings which it does not contain, in an attempt to justify its artificial construction thereof, and thereby to rewrite the statute and the law to suit its own purposes. This it cannot successfully do.

Petitioner's construction of the words used in the Joint Resolution, in the teeth of the definitions so expressly supplied by Congress, violates every canon of statutory interpretation and cannot prevail. *U. S.* v. *Musgrave*, 160 Fed. 700 (1908); see *Sutherland, Statutory Construction*, p. 21, ¶ 3.

Applying the definitions contained in the Joint Resolution itself—and these are the ruling definitions in this case—it becomes crystal clear that the words "obligation incurred" mean the duty to which the contracting party has obligated itself or the liability to which it has subjected itself.

We submit that the Joint Resolution is clear and complete and does not condemn, and was not intended to condemn, payment of foreign monetary units to foreigners abroad. But even were the Resolution incomplete or defective (which we deny), whether as a result of inadvertence, *Ripley* v.

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*Webster's New International Dictionary of the English Language, 2d Ed., 1935—p. 1261.

IN-CUR, v.; curred'; -cur'-ring. (L. *incurrere* to run into or toward, fr. *in* + *currere* to run. See CURRENT.)

Transitive: 1. To meet or fall in with, as something inconvenient or harmful; to become liable or subject to; to bring down upon oneself; as, to *incur* debt, danger, displeasure, penalty, etc.

2. To render liable or subject to; to bring; entail. *Obs.*

Intransitive: 1. To run (into); to fall; enter. *Obs.* 2. To accrue; to be involved.

Syn.—INCUR, CONTRACT agree in the idea of bringing upon oneself something unpleasant, onerous, or injurious. INCUR emphasizes the idea of liability and commonly implies voluntary action; CONTRACT more frequently suggests actual, often involuntary, acquisition; as to *incur* an obligation, a penalty, risk, criticism; to *contract* a disease, or bad habit; "A man may speak of his success without *incurring* justly the odium of conceit" (Crabbe); "Man * * * swarming into clans * * * *contracts* defilement" (Cowper).

Ant.—Avoid, escape, avert.

Gifford, 11 Iowa 367 (1860), or because the case in question was not foreseen or contemplated, *Hull* v. *Hull*, 2 Strob. Eq. (21 S. C. Eq.) 174 (1848), it is beyond the province of the Court to supply the omissions, since this would not construe, but would amend, the law, which is within the exclusive province of the legislating body. *Com.* v. *Gouger*, 21 Pa. Sup. Ct. 217, 229 (1902).

Courts confine themselves to the construction of the law as it is, *St. Louis & S. F. R. Co.* v. *Delk*, 158 Fed. 931 (C. C. A. 6th, 1908), rehearing denied 162 Fed. 145 (1908), and not to an attempt to supply defective legislation or otherwise amend or change the law under the guise of construction. *St. Louis & S. F. R. Co.* v. *Delk*, *supra*.

The construction of the Joint Resolution for which Respondents contend is the construction found within the words and meaning of the statute itself; that construction gives reasonable effect to all its parts; and all parts of the Joint Resolution must yield to the definitions contained within the Resolution itself. The construction for which Petitioner contends would result in an amendment of the statute—judicial legislation—to which this Court should not lend itself.

Petitioner complains that Judge Hand, in the *St. Louis Southwestern* case, omitted to discuss what Petitioner describes as "the principal enacting sentence of the Resolution, viz., the second sentence of clause (a)". By what process of reasoning Petitioner reached the conclusion that the second sentence of clause (a) is "the principal enacting sentence of the Resolution", it is difficult to fathom.[10] But whether or not one or another sentence of the Joint Resolution be

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[10] In fact, we should assume that ordinarily each sentence of a statute would be of equal weight with every other sentence. But, so far as concerns the Joint Resolution, if one sentence be deemed to have more weight than another, it is the *first sentence* that must be deemed to be the "principal" one relating to "provisions of obligations," because the preamble (from which the intention of the lawmakers may be gathered) does not refer to obligations *per se*, but does refer to "provisions of obligations" purporting to give the obligee the right to require payment (a) "in gold," or (b) "a particular kind of coin or currency of the United States," or (c) "in an amount in money of the United States measured thereby." Cf. *Knowlton* v. *Moore*, 178 U. S. 41 (1900); *Hammersmith etc. R. Co.* v. *Brand*, 21 L. T. R. N. S. 238 (H. of L. 1869); see *Sutherland, Statutory Construction*, 2nd Ed., Vol. 2, pp. 655-

the "principal enacting sentence", Petitioner's statement is a palpable error. Judge Hand's excellent opinion discussed all parts of the Joint Resolution. and (at page 12) correctly construed the second sentence of clause (a) in the following powerful and logical summary:.

> "It is true that 'a particular kind of coin or currency' means only United States coin or currency, and that 'obligation' means an obligation payable in money of the United States'; still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. **That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not.**"

Petitioner is to-day "voluntarily" paying guilders in Holland to a selected number of coupon holders who comply with certain of its unauthorized requirements (see pp. 27-28 of its Brief; see, also, p. 70 *infra*).

This action on Petitioner's part places it on the horns of a dilemna. It argues on the one hand that payment in guilders on these multiple currency coupons is prohibited by the Joint Resolution because, says the Petitioner (e. g., pp. 27, 38) "it is the *mandate of Congress* that they"—the coupons—" 'shall be discharged upon payment, dollar for dollar, in * * * legal tender', whether or not they contain gold clauses."

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658 [particularly p. 654—"The preamble"], and cases there cited, which at p. 653 quotes from *White* v. *Levy*, 91 Ala. 175 [1890], as follows:

> "If the legislative intent is clearly expressed in the preamble, and the body of the act is so construed as to render its meaning and intent uncertain; and if the act admits of two constructions,—one in accord with the intent clearly expressed in the preamble, and the other in conflict with it,—the courts should adopt that construction which harmonizes with the preamble.")

The construction contended for by Petitioner is not in harmony with the preamble of the Resolution, or with the principles enumerated by this outstanding writer. The construction contended for by Respondents is in accord with the intent of the Joint Resolution, clearly expressed therein.

If indeed, such is the *"mandate" of Congress* (which we deny), then the word "shall" must be construed as imperative and Petitioner, by such "voluntary" payments, must itself be violating the Joint Resolution—otherwise its references to the so-called "mandate" of Congress must be considered as arguments of convenience only. Indeed, if such be the "mandate" of Congress, Petitioner would be compelled to pay $25—even if 62.25 guilders were worth only a fraction of that amount (the German mark alternative in No. 590 is an apt illustration). Nothing could better illustrate that in fact no such "mandate" exists.

At page 28 of its brief, Petitioner seeks to soften the blow of its own reasoning by saying that it may not be *forced* to make such payments, but may do so voluntarily.

But the Joint Resolution may not be construed by Petitioner in one fashion for some of its foreign creditors, and in a different fashion for other foreign creditors holding its identical instruments. Either the Joint Resolution applies to the foreign money alternatives, when the instruments are owned by foreigners, or it does not. We contend that it does not. **Petitioner must itself believe that it does not so apply, for it is inconceivable that otherwise it would "voluntarily" make such payments.** Such action on its part, if it were under no obligation to make such payments (which it contends to be the fact) would, it seems to us, constitute a wilful and unlawful waste of Petitioner's assets by its officers and directors.

The short answer is that Petitioner's refusal to pay guilders in Holland to foreigners resident abroad upon these coupons is an obvious afterthought (compare letter of January 11, 1934, promising that payments in foreign currencies would be made to foreign "residents" [R. 57-58], with letter of August 7, 1934, retracting such statement in respect of certain foreign holders [R. 59-60]) and has no basis in law.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies abroad remaining unaffected.

The Joint Resolution struck the words "gold coin", attached to the dollar amount, from the coupons, the resulting

promise to pay lawful money and the separate promises to pay in foreign currencies abroad remaining intact. *Nussbaum, Multiple Currency and Index Clauses,* 84 U. of Pa. L. R. 569, 571, March, 1936 (commenting favorably upon the decision of the Circuit Court of Appeals in the *St. Louis Southwestern* case. In the article Professor Nussbaum treats the subject of multiple currency clauses exhaustively and concludes that the Joint Resolution does not affect such clauses).

The wording of the Resolution itself makes clear that only the dollar "gold coin" clause of the coupons was intended to be affected—"Every obligation * * * shall be discharged upon payment, **dollar for dollar** * * *,"—not "dollar for pound," or "dollar for guilder," or "dollar for franc,"—but one dollar of lawful American money for each dollar of a particular kind of American money.

Only that single term of that particular one of the promises in the coupons is impossible to perform and illegal (i. e., the "gold coin" term), the resulting promise to pay lawful money and all the separate promises to pay in foreign currencies abroad contained in the bonds and coupons remaining unaffected. *Norman* v. *Baltimore & Ohio R. R., supra,* at 299.

In the *Norman* case, this Court stripped the instrument of its "gold clause" **term,** and left the remainder of the promise unaffected.[11] Following the same reasoning, and stripping the coupons of the "gold clause" term, they become promises to pay $25 lawful money of the United States in America, **or,** at the choice of the holder, in London, England, 5 pounds, 2 shillings, 10 pence, **or,** at the choice of the holder, in Amsterdam, Holland, 62.25 guilders. When the holder elected to take 62.25 guilders in Amsterdam, Holland, all other alternatives were thereby discarded, and Petitioner

[11] "* * * the Government contends that 'the present debtor would be excused, in an action on the bonds, from the obligation to pay in gold coin,' but, 'as only one term of the promise in the gold clause is impossible to perform and illegal,' the remainder of the obligation should stand and thus the obligation 'becomes one to pay the stated number of dollars'." *Norman* v. *Baltimore & Ohio R. R.*, 294 U. S. 240, 299.

was required then to perform according to the single performance then required. *Restatement, Conflict of Laws*, Sec. 356(1).

The coupons must thereupon be read as though they had originally been as follows:

> "On the ..... day of ....., 193..., Bethlehem Steel Company will pay to bearer * * *, in Amsterdam, Holland, Sixty-two Guilders Twenty-five Cents * * *"

This simple reasoning, precisely following the course taken by this Court in the *Norman* case, clearly indicates that the Joint Resolution was not intended to extinguish, and did not in fact extinguish, the "foreign money" alternatives of the coupons.[12]

The contract was legal when made. The fact that one portion of one (unexercised) alternative subsequently became impossible of performance does not destroy the obligor's duty under the (exercised) lawful alternative. *Restatement, Contracts*, Sec. 344, Comment (b); Sec. 469.

The Court of Appeals recognized this reasoning when, in *Zurich General Accident & Liability Ins. Co.* v. *Bethlehem Steel Co.*, No. 590 in this Court,—argued and decided below concurrently with the case at bar,—it made the following statement (No. 590, R. 71):

> "On the facts of this case, the **obligation was not payable in 'money of the United States'** but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become *payable in Switzerland* in Swiss currency."[13]

The fact that foreign holders of the coupons, in addition to their right to take guilders, had the right to take dollars cannot be detrimental to them. They cannot be penalized for

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[12] In fact, not even the whole "gold clause" was extinguished—only "one term of the promise in the gold clause." *Norman* v. *Baltimore & Ohio R.R. Co.*, *supra*, at p. 299. See footnote No. 11, p. 29, *supra*.

[13] At bar, in Holland in Dutch currency.

having secured an additional lawful (but unexercised) right, and this is what Petitioner seeks to do.

> "As soon as the guilder option is exercised, no dollar claim is left. * * * The right to a definite amount of dollars as existing prior to the exercise of the choice is irrelevant in this situation." *Nussbaum*, 84 U. of P. L. R., *supra*, at p. 571.

The fact that all the alternative promises were contained on one piece of paper does not change the guilder promise into one to pay in gold, or in gold dollars, or even in lawful dollars. The contract created as many different obligations as there are different currencies therein. The media of payment being separated by disjunctives, the obligations were alternative. See *Black's Law Dictionary* (2nd Ed.), p. 843.

An apt illustration of the multiple currency features of a contract is found in *Petkus* v. *Lietuvos Ukio Bankas, supra*. Plaintiff in that case agreed to purchase stock in a bank in Lithuania. The contract provided that payment could be made with either German marks or United States dollars. Plaintiff purchased with German marks, procuring the same with American dollars, transmitting the check for the marks to the defendant.

In an opinion which is a model of careful reasoning, the Court held (at p. 195) that *the option* which was afforded to the plaintiff "by the defendant as to the manner in which he might pay for the stock *did not persist in the relations of the parties after the option had been acted upon by the plaintiff*," saying, further (at p. 196):

> "Plaintiff was entitled to the stock or the German marks paid as of the then value of either, on August 4, 1921, the day when the contract was to be performed."

And so at bar the "option" was afforded to Respondents as to the manner in which they might demand and receive payment for their coupons. The option "did not persist in the relations of the parties after the option had been acted upon by the" Respondents. Once having elected, both Respondents and Petitioner became bound according to the

single performance which was thereafter required. If guilders had thereafter declined in value, Respondents could not have demanded any greater number of guilders by urging that the number of dollars mentioned in the coupons might then have purchased more guilders than Respondents had elected to receive. Because guilders have increased in value, Petitioner may not now pay a lesser number thereof. Once the election had been made, neither the whims of either of the parties or the vagaries of currency fluctuations could change the number of guilders which Petitioner had become obligated to pay and which Respondents were entitled to receive as a result of their election so made.

The number of guilders is specified and set forth in the coupons themselves, viz., 62.25. Such number of guilders is independent of, and in no way connected with, the number of dollars or other currencies set forth in the coupons. The case is different from that in which the coupons might be payable abroad *at the buying rate of exchange* as between guilders and dollars. Were the coupons so worded, and were Respondents to seek the recovery of the number of guilders which a gold dollar might buy, the case might perhaps be different.[14] Whether or not in such a suppositious case Respondents might be entitled to recover, is not, however, the question before this Court.

Petitioner's arguments are all based upon the fallacious premise that the dollar is the primary or controlling medium of payment and that the number of guilders payable is measured by the number of dollars payable. Such is not the fact.

If, for instance (as in No. 384), the coupons had contained an alternative for payment in German marks, and a German citizen elected to receive 105.05 pre-war marks (now worthless) in Berlin, Germany, in accordance with the fixed terms of the coupons, he would not be entitled thereafter to demand or to receive the $25 set forth in the unexercised alternative

[14] We do not concede such to be the law, since the law of the place of performance would govern, and even under the Joint Resolution the number of foreign monetary units could not be considered as "an amount in money of the United States" measured by "gold" or by "a particular kind of coin or currency of the United States."

in the coupons, even though that number of dollars would purchase a vastly greater number of German marks.

In the instant case, there is just as much logic in permitting Petitioner to specify that the holder must take dollars (although he has chosen guilders) as there would be in permitting it to specify that the holder must take worthless pre-war German marks. If the Debtor has the choice of one currency (dollars), despite its express agreement that the choice resides in the holder, it might just as logically be argued that it has the choice of any other currency whatsoever—a ridiculous situation and one for which even Petitioner cannot contend. Cf. *Hulbert* v. *Carver*, 37 Barb. (N.Y.) 62 (1862).

Thus, the coupons before this Court contain separate, distinct and alternative methods of payment, at the option of the holder, and the number of monetary units demandable and receivable by the holder in foreign countries is in no way dependent upon or related to the dollar.

Such being clearly the case, it is inescapable that the Joint Resolution (which nowhere mentions multiple currency, even by indirection) does not apply to the exercised foreign currency alternative in the coupons before this Court.

Petitioner complains (Petitioner's Brief, p. 11) that if Respondent's construction of the Joint Resolution be correct, there is nothing to prevent the issuance of multiple currency clauses at the present time. That question is not before this Court in this case. Suffice it to say, however, that neither the Joint Resolution nor any other legislation of which we are aware prohibits such instruments. Conceding as we do that the words "lawful money" are substituted for the words "gold coin," it would be perfectly lawful for any debtor to-day to issue instruments payable in "$25 lawful money of the United States in the City of New York, or, at the option of the holder, in 62.25 guilders in Amsterdam, Holland."

There is nothing particularly startling about this. No corporation of the same or kindred status as Petitioner is compelled in the future to finance itself through the use of instruments with multiple currency clauses,—unless perhaps

it seeks (as Petitioner vigorously and avowedly did here) an international market. Nor does the obvious validity of such clauses now and in the future change the fact that Petitioner did issue instruments with multiple currency clauses, and that the Joint Resolution does not apply to such instruments so issued. Petitioner's veiled implication that to hold the Joint Resolution inapplicable to multiple currency clauses contained instruments issued in 1912 would put it at the mercy of the investing public as to future financing is laughable in view of the fact that the only corporations which issued such instruments in the past and are now attempting to defeat the claims of creditors, like in this case, on multiple currency clauses, are a few large corporations like Petitioner, Southern Pacific Company and St. Louis Southwestern Railway Company (the latter two also being Respondents in No. 384). The elimination of such multiple currency clauses in the future financing of these few corporations now amounting to five, at the most (see footnote 22, p. 53), is obviously a mere matter of future contract agreement and draftsmanship. Certainly no argument for relieving Petitioner from its present liability to foreign creditors who relied and were led to rely on the multiple currency features in Petitioner's past financing can be predicated upon the imaginary fears to which Petitioner now pretends.

Petitioner itself answered the argument it now advances when, in its reply brief in the Court of Appeals in the instant case, it made the following statement (at p. 4):

> "The defendant makes no contention that the provision for payment of guilders in the obligations in suit is proscribed by the Joint Resolution."

Such being admittedly the case, and on the only proper reading of the coupons, Respondents must recover the full amount sued for.

The situation was summed up by Southern Pacific Company (one of the Respondents in No. 384, argued concurrently herewith), when it made the following statement at page 77 of its brief to the Circuit Court of Appeals, 9th

in *McAdoo v. Southern Pacific Co.* (cited and discussed at pages 64-66 *et seq., infra*), commenting on coupons of the same issue as are involved in No. 384:

"The promise was no more to pay in United States money than it was to pay in German marks, etc."

The coupons at bar were never payable or capable of being paid in money of the United States, there never having been an election to receive the same by Respondents, in whom the right of election resided.[15]

(3) The Joint Resolution can in no way affect a contract to be performed in another country in the lawful money of that country.

Legislation is presumptively territorial only and is confined to the limits over which the law-making power has jurisdiction. The Joint Resolution could not impair the payment promised to be made in Holland. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *Sandberg v. McDonald*, 248 U. S. 185 (1918); *Bond v. Jay*, 7 Cranch. 350 (1813); *Hilton v. Guyot*, 159 U. S. 113, 163 (1895); *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company, supra*; see also *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, dissent, cited and discussed at p. 63, *infra*.

The Canadian courts were confronted with a question similar to that here presented, when the Canadian dollar depreciated in terms of the United States dollar.

Extensive research of American, English, French and Canadian authorities was made by Mr. Justice Maclennan in *La Corporation des Obligations Municipales Limitée v. Ville de Montreal-Nord*, 59 Cour Superieure 550 (Quebec, 1921). The plaintiff in that case was the holder of coupons of the face value of $213 payable at the holder's option at the Banque d'Hochelaga, in the City of Montreal, or at the office

[15] See Harvard Law Review, Vol. 49 (November, 1935), at page 153, which, in commenting upon the *City Bank*, *McAdoo* and *St. Louis Southwestern* cases [discussed *infra*, Point B (10), p. 59], states:

"The joint resolution does not seem to affect these obligations, for, in the commercial sense, they were not 'payable' in United States money in the absence of an election to receive it."

of the National Park Bank, in the City of New York, or at the Clydesdale Bank, Ltd., in the City of London. Plaintiff presented the coupons in New York and demanded American dollars which were then at a premium. Defendant, City of Montreal, refused to pay in any other than the face amount in Canadian currency. On the due date it required $242.82 in Canadian currency to produce $213 in American currency. The Court held that plaintiff was entitled to receive $213 in American currency and, since plaintiff could recover its damages only in Canadian currency, judgment was given for a sum of money which would produce the amount of the coupons in American currency on the due date, to wit: the sum of $242.82 in Canadian currency.

In *Les Commissairs D'Ecole de la Municipalite Scolaire de St. Charles* v. *La Societe des Artisans Canadiens-Francais*, 33 Quebec K. B. 448 (1922), suit was brought in Canada on $30 coupons payable in gold, at the holder's option, at the chief office of the Banque d'Hochelaga, at Montreal, or at the National Park Bank in the City of New York. The plaintiff exercised its option and on the due date presented the coupons in New York where American currency was at a premium of 13½%.

Mr. Justice Martin said (p. 449):

> "* * * The unequivocal promise of the appellants expressed in plain and clear language was to pay the debt in New York and whatever the rate of exchange may have been, and it is a matter of common knowledge during the past few years it has fluctuated, it must pay at the time and place indicated in its obligation, and it does not satisfy that obligation by offering to pay in another manner, and it is rather a novel proposition to seriously contend that it can do so,"

and

> "The proposition is so elementary that one would hardly think it called for extended consideration."

Mr. Justice Greenshield, concurring, said (at p. 451):

> "* * * The rate of exchange which happened to prevail at the time of maturity of the obligation in

> no way affected the rights or obligations between the parties as contained in the contract. * * * Whether that $30 had a greater purchasing power in a foreign country is, in my opinion, entirely outside the mark and has nothing whatever to do with the contractual obligations of the parties."

In *Jackson* v. *United States*, 60 Ct. of Cl. 599 (1925), plaintiff entered into a contract with the United States to erect radio towers in France. The contract provided for payment in dollars. The Government paid plaintiff in depreciated francs. Plaintiff took the francs, and sued for the difference.

The Court found the Government's contention "most singular, why the contractor was not paid as the contract provides." In rendering judgment for plaintiff, the Court stated:

> "By what process of reasoning the meaning, scope and obligation clearly imposed by the provision could be perverted and ignored presents a problem of no easy solution. * * *
>
> "The contract provided that the contractor was to receive as payment for his undertaking so many *dollars*, and the payment of any less sum would not, and could not, by any lawful mean discharge the obligation or relieve the liability."

By the same token, it is manifest that a sum of dollars which is insufficient to produce for Petitioner the exact number of guilders specified in the coupons cannot constitute a discharge of the obligation.

The language of Lord Chancellor Eldon in *Cash* v. *Kenion*, 11 Vesey 316 (1805), is peculiarly appropriate:

> "I cannot bring myself to doubt that where a man agrees to pay one hundred pounds in London on the first of January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

(4) Payment in guilders is not equivalent to payment in gold.

Petitioner concedes that if the coupons were payable in guilders only, the Joint Resolution would not apply.[16] As already indicated, the only thing which the Joint Resolution accomplished was to strike the words "gold coin" from the dollar amount. *Norman* v. *Baltimore & Ohio R. R., supra.* Such being the case, and substituting the words "lawful dollars" for "gold dollars" wherever they appear in the coupons (as accomplished and intended to be accomplished by the Joint Resolution), it is apparent that Petitioner must fail in its contention that the words "gold coin," attached to the dollar amount, permit it to pay that dollar amount in lieu of the number of guilders set forth in the coupons, even after the holder had exercised his choice to take guilders—for the simple additional reason that payment in guilders is not equivalent to payment in gold.

At the time when the coupons were issued or sold and at all pertinent times, the guilder was and is the monetary unit of Holland, and the Nederlandsche Bank was and is entitled to act as its circulation bank. During all pertinent times the Nederlandsche Bank had the exclusive right to issue notes, and by Article I of the Law of July 18, 1904, Section 189, it is provided that so long as the Nederlandsche Bank is entitled to act as circulation bank, its notes have the quality of legal tender and lawful money; and its notes now are legal tender, except as to payments to be made by the Nederlandsche Bank itself. The currency units of The Netherlands are provided for by the monetary laws thereof. In addition to the notes of the Nederlandsche Bank, certain silver coins have the quality of legal tender "up to any amount"; **there is not even a gold guilder;** and an important gold coin, the gold dukaat, is expressly provided to be "without the quality of legal tender". In fact, also, Holland has suspended gold exports (R. 51; see also No. 384, R. 165 *et seq.*).

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[16] Even Judge Stone in the opinion below for the Circuit Court of Appeals in No. 384 indicates that this might well be the fact (No. 384, R. 254). After the election to take guilders, the promise at bar did in fact become one to pay guilders only.

The correct conclusion was reached by Judge Learned Hand in the *St. Louis Southwestern* case, at pages 11-12, as follows:

> "As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. **If he chose any of the foreign currencies he could not get gold;** he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible,' not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved pro tanto, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. **If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt."**

And again at page 12:

> "* * * foreign money[17] is a commodity like wheat or shoes, and lawful to buy unlike gold."

To the same effect, see *Restatement, Conflict of Laws*, Sec. 423, comment (a).

The situation in the United States with respect to the export of gold by the Federal Reserve Bank is identical with that in Holland with respect to the export of gold by the Nederlandsche Bank.

The present lawful dollar of the United States is measured in gold, 15-5/21 grains nine-tenths fine (Presidential Proclamation of January 31, 1934) although not redeemable in gold.

Under the Gold Reserve Act of 1934 and the Provisional Regulations issued thereunder (Art. IV, Secs. 28 and 29), gold may be held, transported, imported, exported, or earmarked, or held in custody for foreign or domestic account by Federal Reserve banks for the purpose, among other things, of settling international balances.

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[17] As to "guilders."

If the argument advanced by Petitioner prevails, then, by the same token, payment in present lawful money of the United States (Federal Reserve notes) must likewise be regarded as equivalent to payment in gold and in violation of the Joint Resolution. Of course, Petitioner will not seriously argue that payment in present lawful Federal Reserve notes would constitute payment in gold or its "equivalent". However, its argument, followed to its logical conclusion, would relieve it from any payment whatever.[18]

As a matter of fact, Respondents could not have demanded gold guilders, or any particular kind of guilders, nor could they have obtained them even if demanded. Neither gold, nor gold guilders, nor any particular kind of guilders were demanded (see typical forms of protest, R. 88-89, 89-90). *Cf. First Nat. Bank of Chicago* v. *Anderson*, 285 Ill. App. 584 (1936); rehearing denied May 5, 1936. Payment in any kind of lawful guilders (i. e., notes of the Nederlandsche Bank)—see typical forms of protest, R. 88-89, 89-90—would have lawfully satisfied the demand.[19]

The fact that guilders are not the equivalent of gold is exemplified even by the brief to the Appellate Division for this very Petitioner in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634 (1935) (where

[18] It may be noted that, although the coupons sued upon in the Zurich case (No. 590) contain an alternative in the holder to demand and receive guilders, the number of guilders specified in said coupons is **62**, the number of dollars specified being $25 (No. 590, R. 8, 12). In the case at bar (No. 591) the number of dollars is likewise fixed at $25, but the number of guilders is fixed at **62.25** (R. 7, 30).

It may be argued that the variance is slight, and that it should therefore be disregarded. But here we have the coupons, payable by the same debtor, expressed, as to dollars, in similar amounts, but alternatively in a differing number of guilders. It is thus further clearly demonstrated that payment in guilders is not payment in gold, and that the payment of guilders presently demanded would not be a payment in gold or in gold coin. The Lackawanna coupon holder, once having elected to take guilders, can receive from Petitioner only **62** guilders, and not 62.25 guilders. The Bethlehem Steel coupon holder, once having elected to take guilders, can receive from Petitioner **62.25** guilders, and may not be paid any lesser or different amount or any other currency.

[19] In *Stone* v. *Watt*, 81 S. W. (2d) 552 (Court of Civil Appeals, Texas, 1935), not officially reported, the Court said, at page 553:

> "* * * The provision for the payment in gold certainly did not release the appellant from the payment of the debt in other lawful currency."

recovery was denied to a domestic)[20] where the following admission is made in respect of identical coupons from this very issue of bonds:

> "By the terms of these bonds, **dollars only were made payable in gold coin. There was no gold provision for sterling and guilders**" (at p. 40).
>
> * * * * * *
>
> "The Corporation, on the other hand, was protected by the circumstance that it did its own business in the United States and derived its own income in dollars, so that **the only gold obligation in the bonds was one in respect of its own currency,** of which it would always have an adequate supply" (at p. 41).

In its reply brief in the Court of Appeals in the instant case Petitioner makes a similar admission (p. 4):

> "We do not argue that 'payment in guilders is * * * equivalent to payment in gold.'" (Asterisks not ours.)

No court has ever held that payment of guilders in Holland was simply and plainly abolished by the Joint Resolution. The decisions refusing recovery for guilder value[20] were all based upon the fact that the same instrument contained a separate, alternative, distinct (and unexercised) right to the holder of the instrument to take "gold" or "gold coin" dollars.

Inasmuch as payment *simpliciter* in guilders is not interdicted, then, by the same token, a guilder option, the exercise of which results in an identical simple obligation on Petitioner's part to pay the identical guilders, must likewise be equally free from taint.

The situation is well summed up by Judge Learned Hand in the *St. Louis Southwestern* case (at p. 12):

> "Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it." (Asterisks not ours.)

[20] All decisions refusing recovery on the foreign money alternatives in multiple currency instruments, except No. 384, were of lower and intermediate appellate state courts in New York, and have all been overruled in New York by the decisions of the Court of Appeals in No. 590 and in the instant case, No. 591.

Petitioner's real grievance is that performance costs it more than it is willing to pay. Such a defense is without merit. *Norcross* v. *Wills*, 198 N. Y. 336, 341 (1910); *Williston on Contracts*, Sec. 1963 (1938).

(5) Payment in guilders does not affect the equal parity of the dollars of the United States with each other.

In *Norman* v. *Baltimore & Ohio R. Co.*, *supra*, this Court, in concluding its opinion, had the following to say (at p. 316):

> "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make **that currency, dollar for dollar,** legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority."

This Court thus enunciated the principle for which we here contend, viz., that the intention of the Joint Resolution was to establish a "parity between kinds of currency" (of the United States) "and to make that currency" (of the United States) **"dollar for dollar"** legal tender for the payment of debts.

There is no evidence of an intention in the Resolution, nor did this Court in the *Norman* case find that any such intention existed, to establish **guilders** as "legal tender for the payment of debts." Each "dollar" was established as being in parity with every other "dollar." There was no intention to establish a parity between a "dollar" and any foreign currency or indeed any other commodity. *Cf. Petkus* v. *Lietuvos Ukio Bankas*, *supra*.

The Joint Resolution did not establish or attempt to establish guilders as "legal tender." Whether or not Congress might have had the power to do so, had it wished, is quite beside the point.

The argument, advanced by Petitioner in the courts below (now apparently abandoned), that payment in guilders would create a "dual currency" is therefore likewise beside the point. There is no "dual currency" (of the United States or elsewhere) involved in compelling Petitioner to pay guilders in Holland, or damages in the United States for failure to do so.

The fact that a dollar of Petitioner's, when applied to this single purpose, may not purchase as many guilders as Petitioner hopes and wishes it to purchase is likewise quite beside the point. The situation is no different than if, on June 4, 1933, Petitioner had issued a bill of exchange, payable in Holland, to pay 62.25 guilders on June 6, 1933, or at some time thereafter. The Joint Resolution meantime having been passed (on June 5, 1933), Petitioner would not be heard to say, and would not seriously urge, that it was entitled to discharge its obligation to pay 62.25 guilders by the payment of any lesser number of dollars than 62.25 guilders would buy. If $25 would purchase 62.25 guilders on June 4, 1933, and it required $35 to purchase 62.25 guilders on June 6, 1933, it would be absurd for Petitioner to argue that a "dual currency" had thereby been created, or that it was relieved from payment *pro tanto* because the Joint Resolution had meantime been passed. The simple circumstance that the separate, distinct and unexercised alternative to take gold dollars (which the Joint Resolution converted into a promise to pay "paper" dollars) is contained upon the same piece of paper in nowise alters the situation. The election to take guilders, once having been made, became irrevocable, and the duty of Petitioner was then to pay the guilders in Holland in accordance with the single performance then required. *Cf. Petkus* v. *Lietuvos Ukio Bankas, supra; Anglo-Continentale Treuhand* v. *St. Louis Southwestern Railway Co., supra.* Until such election, the coupons represented a continuing offer on Petitioner's part, and until

that offer was crystallized by the exercise of the election. Petitioner was under no duty to pay any sum whatever anywhere. It could not have compelled Respondents to take dollars in the United States; it could not have compelled Respondents to take pounds sterling in London; it could not even have compelled Respondents to take guilders in Holland.

The obligations contained in the coupons could not be satisfied by Petitioner until some affirmative act had been taken by Respondents evidencing the medium of payment which Respondents desired and the place where such payment should be made—all specifically as provided for in the bonds and coupons themselves.

(6) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right of foreigners, resident abroad, to demand and receive guilders in Holland. No public policy inhibits such payment.

> "There is in the Congressional data not the slightest suggestion that Congress had considered an impairment of multiple currency clauses. Those clauses are not mentioned in the Congressional material, either directly or indirectly. * * * Thus, there is at least no documentary evidence for the assertion, which certainly requires proof, that multiple currency clauses were within the intent and spirit of the Joint Resolution." *Nussbaum*, 84 U. of Pa. L. R., *supra*, p. 573.
>
> * * * * * * *
>
> "However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint." *Ibid.*, at p. 575.

In the case of multiple currency clauses, there is no justification to deny or invalidate the liability incurred. "Those obligations have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom.[21] It cannot even be alleged that the rate of exchange risk incurred was not considered by the borrowers. For it is remarkable that in most cases

[21] Such as prevailed with respect to gold coin clauses (discussed in the article at p. 576).

the multiple currency clause was conceded only as to interest, not as to principal. Such a limitation will not be found in any gold bond. That the Joint Resolution cannot be regarded as having simply and plainly abolished the multiple currency clauses is clearly recognized both by the debtors invoking the Resolution and by the New York court"—(referring to the now overruled decision in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co., supra. Nussbaum, ibid.*, at pp. 576-577).

Manifestly, had Congress intended to legislate with respect to multiple currencies, it would have included them in the definitions contained in the Joint Resolution. The omission is most significant. There has been no hesitancy on the part of Congress to legislate specifically with respect to any matters deemed by it to be against public policy.

In *Sutherland, Statutory Construction, supra,* the rule is stated at page 931 that it is presumed that the Legislature does not intend to make any change in the existing law beyond what is expressly declared, and hence repeals by implication are recognized only when there is an unavoidable contradiction. It is stated that the presumption is against any radical change of legislative policy.

Petitioner would, firstly, read into the Joint Resolution a contradiction which does not exist; it would then read into the Joint Resolution a change "beyond what is expressly declared" therein; it would presume a "radical change of legislative policy" (in respect of payment of foreign monetary units to foreigners abroad). And, based upon these faulty premises, it blandly asserts that the Joint Resolution condemns the payment required by Respondents.

Furthermore, the construction of the Joint Resolution for which Petitioner contends is in derogation of the common-law rights of Respondents, and in that aspect the Joint Resolution must be strictly, not liberally, construed. See *Sutherland, supra,* at p. 931.

The words of Lord Halsbury are applicable to the character of argument advanced by Petitioner, when he said, in *Leader* v. *Duffy*, 13 A. C. 294 (H. of L., 1888), at page 301:

> "Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. * * * But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption, to bend the language in favour of the assumption so made."

The foregoing principles must also have guided Judge Hand when he said:

> "Equally we should have no warrant in supposing that when the obligation was to pay foreign money, it was any nearer to the putative purposes of Congress than if it was to do anything else." *St. Louis Southwestern* case, at p. 12.

That multiple currency promises were never intended to come within the condemnation of the Joint Resolution is further evident from Executive Order No. 6560 promulgated January 15, 1934, by the President by virtue of Section 5(b) of the Act of October 6, 1917, 40 Stat. 411, 50 U. S. C. Appendix, Sec. 5, as amended by Section 2 of the Act of March 9, 1933, 48 Stat. 1, 50 U. S. C. Appendix, Sec. 5, prescribing regulations for the investigation, regulation and prohibition of transactions in foreign exchange and transfers of credit.

Certain transactions were prohibited except under license, provided, however, that

> "foreign exchange transactions and transfers of credit may be carried out *without a license* for (a) normal commercial or business requirements * * * (c) the fulfillment of legally enforceable obligations incurred prior to March 9, 1933."

The coupons were issued in 1912. Servicing of a funded debt is surely a "normal commercial or business requirement." Payment of the coupons thus falls within the express permission of these regulations.

The dissenting opinion in No. 590 states that a detailed analysis of the language used in the Joint Resolution would seem to show that the ordinary meaning of the language would reach and apply to every obligation issued before or after June 5, 1933, "capable of being paid in the United States" (No. 590, R. 72). The two dissenting judges, however, failed to point out that the coupons at bar were not, and never became, "capable of being paid in the United States" in the absence of an election on the part of the holders thereof to receive such payment. The choice of the place of payment, as well as the choice of the medium of payment, resided in the holders of the coupons. Petitioner could never have discharged the coupons by tendering dollars in the United States. The situation might have been different if the choice of the place and medium of payment had resided in Petitioner, or if Respondents had chosen gold dollars in America. In such an event, the coupons would have been "capable of being paid in the United States."

This must have been recognized even by the Appellate Division in the instant case, though it held that the Joint Resolution applied to the multiple currency clauses in the coupons. Pursuant to a memorandum of Mr. Justice Cohn (who was one of the majority judges in the Appellate Division and who voted against recovery by Respondents), it was provided (see *infra*, p. 96) that the proposed order submitted to the Appellate Division "should be revised to include interest [to Respondents] on the face [dollar] amounts awarded from the date the coupons were presented for payment."

One reason why the Appellate Division directed that interest be awarded is quite evident from the following facts:

In the typical allegation, contained in paragraph 62 of the amended answer, (R. 40), Petitioner alleged that on the respective due dates of the coupons it was ready, able and willing to pay the same as they respectively became due, *in money of the United States* upon presentation and surrender of said coupons respectively *at the office or agency of the Petitioner in the City of New York in said United States*. The Appellate Division must have believed that this

allegation does not constitute an allegation of tender, nor of any alleged "tender" being kept good.

If the coupons were capable of being paid in money of the United States, in the sense for which Petitioner contends, then an allegation of readiness and willingness to pay dollars in the United States would seem to have been a sufficient allegation of tender. There is, therefore, implicit in the holding of the Appellate Division that Respondents are entitled to interest, the further holding that a willingness to pay in money of the United States in the United States is not a good tender—*ergo* that, Respondents having elected to take guilders in Holland, the coupons were never payable, and never became capable of being paid, in money of the United States.

That Congress did not intend to affect the foreign money alternatives in the coupons is further evident from the fact that guilders are legal tender of The Netherlands. Coupons payable in that country in guilders can be discharged only by payment of Dutch currency, or of damages in this country in lawful American dollars.

Congress must be presumed to know the law, *Sutherland, Statutory Construction, supra,* at p. 929, which, on this point, is as follows:

> "The law of the place of performance determines the medium of payment in which a contract to pay money is to be performed." *Restatement, Conflict of Laws,* Sec. 364.

The law of the place of performance determines the manner of performance, as well as the excuse for non-performance. *Restatement, Conflict of Laws,* Sec. 358(a) and (e); *Andrews* v. *Pond,* 13 Pet. 65, 77 (1839).

The laws of Holland, the place of performance selected by Respondents, provide in Articles 1308-1313 of the Dutch Civil Code that in the case of alternative obligations, where the choice has been left to the creditor, if one of the two things has perished or can no longer be delivered, the creditor is entitled to the other (R. 51).

Such, also, is our own law:

> "Where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible does not excuse the promisor from performing that which remains possible; * * * *Williston on Contracts*, Sec. 1961 (1938).

The words of Judge Hand in the *St. Louis Southwestern* case (at p. 13), holding for foreign plaintiffs, apply with particular force:

> "Congress either forbad the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens. **There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."**

Just as Judge Hand allowed recovery in the *St. Louis Southwestern* case, and just as the Court of Appeals allowed recovery below, payment in the currency of the place of performance (based on the principle that the law of the place of performance governs) is the recognized rule in our Federal and State courts. Both have, for instance, permitted recovery in the United States for the full dollar amount of dollar instruments against contentions that by the laws and currency restrictions of the foreign countries of which the defendants were citizens (but which were not the places of performance) such payments might not lawfully be made, and that such payments imposed hardship upon the debtors. *Central Hanover Bank & Trust Co.* v. *Siemens & Halske Aktiengesellschaft et al.*, 15 F. Supp. 927 (Dist. Ct., S. D. N. Y., 1936), aff'd on opinion below 84 F. (2d) 993 (C. C. A. 2d, 1936), cert. den. 299 U. S. 585 (1936); *Perry* v. *Norddeutscher Lloyd* (*Bremen*) (*North German Lloyd*), 150 Misc. (N. Y.) 73 (1934); *Glynn* v. *United Steel Works Corporation*, 160 Misc. (N. Y.) 405 (1935); *Marks* v. *United Steel Works Corporation*, 160 Misc. (N. Y.) 678 (1935);

Sheppard v. *Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, N. Y. Law Journal, Mar. 14, 1934, p. 1232 (Collins, J.) (not elsewhere reported); *Lann* v. *United Steel Works Corporation*, 166 Misc. (N. Y.) 465 (1938); *Goodman* v. *Deutsch-Atlantische &c.* and *Douglis* v. *Same*, 166 Misc. (N. Y.) 509 (1938); *Mayor* v. *Hungarian Commercial*, No. L. 7424, U. S. D. C., E. D. N. Y., decided July 7, 1934—Galston, J. (not elsewhere reported); *Pan-American Securities Corporation* v. *Fried. Krupp*, 6 N. Y. Supp. (2d) 993 (1938) (not officially reported).

Petitioner has heretofore referred disparagingly to the fact that foreign holders electing to take guilders abroad might make a speculative profit if the claim for guilders were to be allowed. In answer, we can use no better language than that used by Mr. Justice Steinbrink in *Pan-American Securities Corporation* v. *Fried. Krupp*, cited *supra*. The learned Justice had before him a bond issued by a German corporation payable in dollars in America. The German Devisen Laws were pleaded as a defense, and defendant also urged that plaintiff intended to make a speculative profit by the purchase of the securities.

Finding for the plaintiff upon a motion for summary judgment, the Court held, among other things, that the alleged fact that the plaintiff seeks to make a speculative profit is no concern of the Court, "for the answer to such arguments is that if the plaintiff seeks to make a huge speculative profit, so, too, *the defendant seeks to make a larger profit by compelling the plaintiff to accept payment in a depreciated currency.*"

The situation at bar is no different than that which obtains when an investor purchases securities below par and expects full payment on the maturity date. In such a case, just as at bar, the holder is entitled "to recover from the maker to the entire extent of his promise to pay." *Security-First National Bank of Los Angeles* v. *Rindge Land & Navigation Co.*, 85 F. (2nd) 557, 561 (C. C. A., 9th, 1936), cert. den. 299 U. S. 613 (1937), rehear. den. 300 U. S. 686 (1937).

The bonds, from which the coupons sued upon were detached, were acquired *before August 11, 1934* (R. 63-69).

the date upon which Petitioner announced its unwarranted refusal to further pay guilders to foreigners abroad except upon compliance with certain unauthorized requirements imposed by it (R. 59). A number of them were acquired after Petitioner had specifically announced and represented on January 7, 1934, its intention to pay foreign monies to owners residing in foreign countries—not even confining such owners to aliens—(see R. 57-58); and the prices prevailing ranged from about 100½ to 112½ (see affidavit of one of Petitioner's attorneys, R. 85-86).

Petitioner thus early conceded its liability upon these coupons; not only should it thus be estopped from attacking the judgment appealed from, but it comes with very poor grace on its part to do so. It is a defaulting debtor, trying, on flimsy grounds, to avoid a legal obligation wilfully and consciously originally assumed by it. Equity and good conscience, as well as the governing principles of law, thus require that the judgment appealed from be affirmed.

Public policy permits recovery in the United States upon instruments, payment of which is lawful by the law of the place of performance. Furthermore, there is no public policy restricting or prohibiting the payment of guilders, either in the United States or abroad.

(7) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the payment to foreigners abroad of the foreign money alternatives contained in the coupons sued upon.

No dislocation of domestic economy is involved by sustaining the validity of the foreign currency alternatives of the coupons,—especially where, as at bar, foreigners are involved and the payment is demanded abroad.

Thus the petitioner in No. 384, at page 29 of its brief in support of its petition for a writ of certiorari, makes the following correct statement:

> "Multiple currency clauses, unlike gold clauses, applied to a very limited number of contracts and security issues in the year 1933. While the gold clause

> has been estimated to have been in contracts for seventy-five billions of dollars or more (see *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 313), foreign currency options do not amount to 1% of this sum. See Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. Law Rev. 569, 575-6 (March, 1936."[1]

"(1) According to the computation of the Debtor's Trustee, at p. 6, in his unsuccessful petition for certiorari in *Henwood, Trustee* v. *Anglo-Continentale Treuhand, A. G.*, 298 U. S. 655 (1936), only $90,000,000 face amount of outstanding bonds have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. This is a little more than 1/10 of 1% of the aggregate of bonds containing the gold clause."

And Respondents in No. 384, at page 17 of their joint brief in opposition to petition for writ of certiorari in that case, make the following statement:

> "The importance of the precise question at issue, viz., the application of the Joint Resolution to United States money contracts containing foreign money options, *has become of somewhat lesser importance in the last few years.* A number of bond issues having such options have been redeemed recently, *and there are only two uncalled issues,* in addition to the St. Louis Southwestern Railway Company issue, which are payable in money of the United States, or optionally in a foreign money now at a premium, viz., an issue of Southern Pacific Company and an issue assumed by Niagara, Lockport and Ontario Power Co. Also some bonds of this character of the Bethlehem Steel Company, which have been called for payment, are still outstanding. Moreover, the foreign moneys in which these issues are optionally payable, Dutch guilders and Swiss francs, now command a smaller premium than they did several years ago."

In the *Norman* case this Court did not purport to pass upon multiple currency instruments, payable abroad in a foreign monetary unit. Nowhere in the decision is there any indication that the Court entertained the view that the Joint Resolution condemned payment of foreign currency to foreigners abroad—multiple currency clauses were not before the Court for construction. In the argument for the Government, repeated references are made only to the "gold clause" (i. e., at pp. 273-274-275).

There is thus now only an insignificant amount of bonds and coupons containing multiple currency clauses (with alternative payments in currencies selling at other than a slight premium) in the hands of the public, and they constitute only an insignificant fraction of the funded debts of the corporations involved.[22] Bonds and coupons containing foreign money alternatives in currencies selling at a slight premium only (as pounds sterling) or at a discount (as francs or marks) cannot possibly "dislocate" the domestic economy in any way, since the amount required to discharge the same (if the holders elect to take the foreign currencies abroad) is less than the face dollar amount therein mentioned.

This Court said in the *Norman* case (at p. 312):

> "If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence * * *."

Every debtor (save one, the extent of whose liability is based upon $2,605,000 of bonds as expressed in dollars, and save one other debtor whose bonds [not containing multiple currency clauses] have been called for payment, but some multiple currency coupons from which are still outstanding) who may be affected by the decisions at bar is now before this Court; and inasmuch as these multiple currency clauses

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[22] Moody's Manuals show that the following amounts of such bonds are outstanding:

Name of Corporation	*Total funded debt, in dollars (in round thousands)*	*Multiple currency bonds, in the hands of the public, in dollars (in round thousands)*
Bethlehem Steel Company, 5% (Petitioner herein).....	$166,000,000 (Called for payment by Petitioner)	$ 8,000,000
Lackawanna Steel Company, 5%, assumed by Bethlehem Steel Co. (Petitioner herein)		
Southern Pacific Company, 4% (a respondent in No. 384)...	700,000,000	25,000,000
Niagara, Lockport & Ontario Power Company.....	23,816,500	2,605,000
St. Louis Southwestern Railway Co., 5% (a respondent in No. 384) (in reorganization).....	77,000,000	8,063,000

quite apparently apply "to a very limited number of contracts and security issues," there exists no economic justification for holding that the Joint Resolution condemns or prohibits the foreign money alternatives contained in these multiple currency clauses.[23]

(8) To hold that the foreign money alternatives contained in multiple currency clauses are condemned by the Joint Resolution would deprive these holders of these coupons of their property without due process of law in violation of the Fifth and Tenth Amendments.

Specific property was pledged as security for the payment of the Bonds and coupons (R. 79) under a mortgage made in May, 1912, more than twenty-one years prior to the passage of the Joint Resolution (R. 78-79). Payment is guaranteed by Bethlehem Steel Corporation (R. 77).

The property right of a mortgagee to insist upon full payment before giving up his security is of the essence of a mortgage. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 580 (1935). Even for a wholly public use such private property cannot be taken without just compensation (*ibid.*, at p. 602),—much less can it be taken for a private use.

The "taking" here attempted by Petitioner is for a private and not for a public use. That "taking," if Petitioner's contentions be sustained, would operate to take Respondents' "rights in specific property which are of substantial value", *Louisville Joint Stock Land Bank* v. *Radford*, *supra*, at p. 601, from one person (Respondents) and give them to another (Petitioner), in violation of the Fifth and Tenth Amendments of the Constitution.

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[23] The insignificant amounts involved in payment of these coupons in guilders will appear in sharp relief when compared with foreign exchange movements generally—see "Statistics of Capital Movements between the United States and Foreign Countries and of Purchases and Sales of Foreign Exchange in the United States, Third Quarter, 1938, Report No. 9" published by the United States Treasury Department, particularly Table I, page 11.

In addition to having a security right in specific property, the bondholders have a *property* right, represented by Petitioner's various promises to pay, as contained in the coupons. They are entitled to recover from the maker to the entire extent of that maker's promises to pay.

As was said in *Security-First Nat. Bank of Los Angeles et al. v. Rindge Land & Navigation Co. et al., supra:*

> "The legal value or property right in an obligation is the right to recover from the maker to **the entire extent of his promise to pay.** The consideration given for a security by the holder thereof is immaterial. Wade v. Chicago, Springfield & St. Louis R. Co., 149 U. S. 327, 343, 13 S. Ct. 892, 37 L. Ed. 755; In re Tennessee Publishing Co. (C. C. A. 6), 81 F. (2d) 463, 466."

The "entire extent" of Petitioner's "promise to pay" comprises not only the promise to pay the dollars in the United States, but also, at the option of the holders, to pay the guilders in Holland. To deprive the coupon holders of so much of the promises to them as represents their right to receive guilders in Holland is to deprive them of a valuable property right without due process of law.

The Joint Resolution should, if possible, be construed so as to avoid this unconstitutional result of confiscating the property of the bondholders and coupon holders for the benefit of Petitioner. To this end, that construction thereof which will save the Resolution should be adopted. *National Labor Relations Board* v. *Jones & Laughlin, etc.*, 301 U. S. 1, 30 (1937).

As stated by Mr. Justice Holmes in *United States* v. *Moy*, 241 U. S. 394, 401 (1916):

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909); *Hovey* v. *De Long Hook & Eye Co.*, 211 N. Y. 420, 429 (1914).

See further *Hare, American Constitutional Law* (1889), Vol. II, pp. 1233-1239, in which it is said:

> "It results from these considerations that the power of Congress over the currency is supreme. It has no limit, because none is set to it in the Constitution. * * *
>
> "*The parties might have placed themselves beyond the reach of Congress by stipulating for payment in wheat* * * * and submitting to the uncertainty, delay, and other inconveniences inseparable from such a mode of contracting; among which may be mentioned * * * the necessity for calling a jury to assess the damages. * * * If the question of value is left to the government by bargaining for money, * * * the parties must submit * * *. This will be true, even when a particular kind of money is contracted or, so long as the contract is for lawful money of the country, because the limitation will be rejected as inconsistent with the general design of the contract. That a particular must yield to a general intent, when both cannot stand consistently with each other, or with the law, is a well-settled rule in the construction of grants and contracts; and no repugnancy can be greater than that which must result from an attempt to unite the different and irreconcilable attributes of money and merchandise, of bullion and coin, * * * (citing *Shoenberger* v. *Watts*, 5 Phila. 51, 56 [1882])."

Thus the powers of Congress cannot constitutionally be expanded to condemn payment to foreigners of guilders abroad nor to deprive these holders of these instruments of their express valuable contract and property rights in the manner contended for by, and for the private benefit of, Petitioner.

(9) This Court's decision in the "Holyoke" Case supports our position.

Petitioner urges that *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324 (1937) (hereinafter referred to as the "*Holyoke* case"), is persuasive of the issues here presented.

An examination of that case shows at once that *no question of multiple currencies was even remotely involved.*

Certain leases were executed by the Water Power Company to the Paper Company.

> "By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent 'a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency.'" (p. 333).

Applying the Joint Resolution, this Court held (pp. 335, 339) that the obligation was for the payment of money and not for the delivery of gold as upon the sale of a commodity, and that (p. 337) the contract, being for the payment of **money of the United States** measureable in gold, "is within the letter of the Joint Resolution."

Our contentions at bar are entirely consistent with the decision thus reached. Applying the definitions appearing in the Joint Resolution itself, it readily appears that one alternative of the contract in the *Holyoke* case was for the payment of a quantity of "gold" which should equal a specific amount of "a particular kind of coin or currency of the United States," and therefore came within the specific condemnation of the Joint Resolution. The other alternative was for the payment of "a particular kind of coin or currency of the United States," or "in an amount in money of the United States measured thereby," and therefore also quite properly came within the condemnation of the Resolution.

This Court's approach to the problem in the *Holyoke* case is set forth at page 340 of the opinion:

> "If the currency[24] to be paid by the lessee is to be the equivalent of gold, and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then *the covenant to pay the currency*[24] is tantamount to a covenant to pay the dollars, and dollars of the stated standard."

Thus, in the *Holyoke* case, this Court condemned only that *"covenant to pay the currency"*[24] *(of the United States)* which was equivalent to the "gold" or the "particular kind" of currency referred to in the lease. Mr. Justice Cardozo even went so far as to indicate that if the covenant had even been one to pay *gold as a commodity* (if the recipient were engaged in an art requiring gold) it would not have been condemned.[25]

In fact, as indicating that this Court had no intention of even remotely touching the multiple currency question (as to which it had denied certiorari in the *St. Louis Southwestern* case less than a year earlier), we quote the following from the opinion at pages 335-336:

> "Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: 'If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. * * *.' (*Legal Tender Cases*, 12 Wall. 457, 566 [1870].)"

Paraphrasing the words of Mr. Justice Cardozo, the contract at bar is for "a specific commodity or substance" (Dutch guilders) and the Joint Resolution does not apply.

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[24] Under the definitions in paragraph 1(b) of the Joint Resolution, the "currency" to which the Court refers is "coin or currency" *of the United States."*

[25] We do not concede that the word "payable" means "capable of being paid," as Petitioner contends. But it is worth noting that in the *Holyoke* case the *obligor* had the choice of the media of payment. The obligation in that case might therefore have been "capable of being paid" in money of the United States—different from the case at bar, where the coupons were never "capable of being paid" by the debtor until an election had been made by the foreign creditor, and thereafter were "capable of being paid" in Dutch money only and in Holland only.

In exact line with the reasoning in the *Norman* case—to the effect that *only one term* of the promise was impossible to perform and illegal (i. e., the "gold coin" *term*), all the separate promises to pay in foreign currencies remaining unaffected,—this Court, in reaching its conclusions in the *Holyoke* case, stripped the instrument of its "gold" and "gold coin" TERMS, the remainder of the instrument remaining intact and unaffected, and becoming one to pay the stated number of dollars.

In exact compliance with the Joint Resolution, also, the Court ordered that the obligation be discharged "DOLLAR FOR DOLLAR"—a dollar of present lawful money for a dollar of a "particular kind" referred to in the lease—specifically as provided for in the Joint Resolution,—no more and no less was decided.

Petitioner urges that in the *Holyoke* case this Court condemned "verbal variants" of the gold clauses, and Petitioner seeks to broaden the *Holyoke* decision, as if the multiple currency clauses were "verbal variants" of the "gold clause"—which in fact they are not. The multiple currency clauses are independent promises in every way, and are not measured by or dependent upon one another, as were the promises in the *Holyoke* case.

Accordingly, on analysis, not only is the *Holyoke* case incapable of the application to the case at bar for which Petitioner contends, but, properly read, it actually supports our position that the Joint Resolution does not apply to the foreign money alternatives in multiple currency clauses.

(10) Decisions of Federal and State Courts construing the Federal statute here involved in relation to the foreign money alternatives in multiple currency clauses support our position.

The application of the Joint Resolution to the foreign money alternatives in multiple currency clauses has been the subject of litigation in four jurisdictions, viz., the State courts of New York, the Federal courts in California, the Federal courts in New York, and the Federal courts in Missouri.

Save and except in one case,[26] the governing decisions all jurisdictions sustain the proposition that the Joint Re lution is not applicable to foreign money alternatives c tained in the multiple currency features of the promises, a does not prohibit or bar the payment abroad of the speci number of foreign monetary units specified in the inst ments, even though, in the same piece of paper, there is c tained an unexercised separate and distinct option to t gold dollars.

(a) The law in the State of New York has been settled recently as January 11, 1939, by the opinion of the Court Appeals of that State, to the effect that the Joint Resoluti is not applicable to multiple currency clauses in two ca now under review by this Court. *Zurich General Acciden Liability Insurance Co.* v. *Bethlehem Steel Co.*, 164 Mi (N. Y.) 498 (1937), aff'd 254 App. Div. 839 (1st De 1938), reversed .... N. Y. (1939), No. 590 in this Cou and the instant case, *Anglo-Continentale Treuhand, A. G. Bethlehem Steel Co.*, 6 N. Y. Supp. (2d) 334 (1938) (officially reported), modified, and affirmed as modified, 2 App. Div. 844 (1st Dept., 1938), judgment of Appellate D sion reversed and that of Special Term affirmed, with co .... N. Y. .... (1939), No. 591 in this Court.

The *Zurich* case involved multiple currency coupons fr an issue of multiple currency bonds issued by Lackawan Steel Company, Petitioner's predecessor, similar to those bar, i. e., payable in gold dollars in the United States America, or in a specified number of pounds sterling in E land, or in a specified number of guilders in Holland, or a specified number of marks in Germany, or in a specif number of francs in France, Belgium or Switzerland (590, R. 8, 12).

The plaintiff in that case, a foreign corporation, deman payment in Switzerland of the number of Swiss francs forth in the coupons, but payment was refused. The co at Special Term granted summary judgment for the f

[26] *Guaranty Trust Co. etc.* v. *Henwood*, 98 F. (2d) 160 (C. C. A. 1938); now on appeal to this Court, No. 384.

amount of the *dollars* set forth in the coupons, and dismissed the complaint as to the balance; the Appellate Division affirmed (two Justices dissenting); the Court of Appeals reversed the Appellate Division and the lower court, and granted plaintiffs' motion for summary judgment for the full value of the Swiss francs sued upon.

The following appears in the majority opinion:

> "The question is whether, on the facts of this case, the Joint Resolution is applicable to **this obligation to pay foreign currency to a foreign corporation in a foreign country.** The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.* (81 Fed. 2d, 11,—1936), wherein the facts were the same [as] at bar except that payment was made in Guilders at Amsterdam instead of Francs at Zurich. * * *
>
> "On the facts of this case, the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. **The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.**"

In the instant case (No. 591) argued and decided concurrently with the *Zurich* case, Petitioner's amended answer had been stricken and summary judgment had been rendered at Special Term for the full amount sued for, based on Petitioner's refusal to pay in Holland the specified number of guilders set forth in multiple currency coupons detached from multiple currency bonds of Petitioner (similar to the Lackawanna Steel Company bonds and coupons involved in the *Zurich* case). The Appellate Division (two Justices dissenting) modified the judgment, by reducing the same to the face amount of the *dollars* set forth in the coupons (though allowing interest from the date of presentation), and, as so modified, affirmed the judgment (a somewhat

anomalous holding, the effect of which was to compel Respondents to accept the face amount of the *dollars* in the United States set forth in the coupons, but to compel Petitioner to pay interest for its refusal to pay the guilders demanded in Holland by the Respondents). The Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of the Special Term, with costs to the Respondents.

The following appears in the *per curiam* opinion (R. 109):

> "This action is the same in principle as the *Zurich Insurance Company* case decided herewith. In the present litigation the trial justice granted plaintiffs' motion for summary judgment for the amount demanded in the complaint but the Appellate Division modified by reducing the judgment to amounts to conform with the theory that the Joint Resolution of Congress required payment of these coupons in foreign currency in a foreign country based upon the value of United States dollars as depreciated. The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs, etc."

The law in New York thus having been settled by the Court of Appeals, all decisions of the Appellate Division or of the lower courts of New York, from which the inference might be drawn that the Joint Resolution applies to the foreign money alternatives of multiple currency clauses may thereby be deemed overruled.[27]

The Court of Appeals opinions can now be taken as adopting Mr. Justice Merrell's dissent in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634 (1st

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[27] *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634 (1st Dept., 1935); *Anglo-Continentale Treuhand, A.G.* v. *Southern Pacific Co.*, 155 Misc. (N. Y.) 562 (1936), affirmed without opinion, 251 App. Div. 803 (1st Dept., 1937), motion for reargument or leave to appeal to Court of Appeals denied, 251 App. Div. 885 (1st Dept., 1937); *Hydropress Handels. A.G.* v. *Lackawanna Steel Co.*, New York Law Journal, May 7, 1938, page 2221 (not officially reported); also the decision of the Appellate Division and of the Trial Justice in the *Zurich* case and of the Appellate Division in the instant case. It is worthy of note that even in all of the aforesaid opinions (except in the *Zurich* case below) language appears indicating that foreigners have the right to recover foreign moneys abroad on multiple currency clauses.

Lower court decisions in New York State which now remain in harmony with the decisions of the Court of Appeals, and which may be regarded as

Dept., 1935) (herein sometimes called the *"City Bank"* case). In that case the majority held that a *domestic*[28] trustee could not recover the value of guilders upon multiple currency coupons of the issue at bar but was limited in its recovery to the face dollar amount of the coupons.

Mr. Justice Merrell vigorously dissented (see pp. 640-641 of 244 App. Div.), stating, among other things:

"* * * The resolution is carefully limited to obligations 'payable in money of the United States,' and payable in 'a particular kind of coin or currency of the United States.' There is no intention on the part of the Congress to extend the resolution to obligations payable in foreign countries in a foreign currency. The absence of any such intention is clearly shown by the preamble of the resolution, which stated as follows:

* * * * * * *

"The resolution itself is clear and unambiguous and should not be extended by interpretation or construction to include any reference to obligations other than those which are payable in money of the United States. Under well-recognized constitutional limitations the Congress had no power to extend the scope of the resolution so as to give it extraterritorial effect * * * Neither the power of the Congress to regulate the value of the money of the United States nor 'the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts,' has any application to the contract here involved, which contract provided expressly for the payment of the coupons in guilders at Amsterdam,

having validity, are: *Mondiale Handels-und Verwaltungs and another* v. *Bethlehem Iron & Steel Corporation; Nederlandsche Middenstandsbank N. V. and others* v. *Bethlehem Steel Co.; Zurich General Accident & Liability Ins. Co.* v. *Bethlehem Iron & Steel Co.* (all decided by Mr. Justice Hofstadter and all reported only in New York Law Journal, June 13, 1936, p. 3029).

The judgments in all three last-mentioned cases were paid in full with interest, and they, together with the *St. Louis Southwestern* case, constitute the only final, unappealable holdings on the question—all to the effect that the Joint Resolution does not affect the foreign money alternatives contained in the multiple currency features of the coupons sued upon.

[28] According to the majority opinion (p. 636), it was not contended that the holders of the coupons, who were subjects of England and Holland, respectively, were governed by the terms of the Joint Resolution (see p. 68, *infra*).

> Holland, in case the holder exercised its option to pre
> sent the same for payment there. In adopting thi
> resolution the Congress recognized that it could no
> make this law effective in a foreign country. Th
> Congress must have recognized that its declaration
> as to the American public policy had nothing to do
> with contracts to be performed abroad."

(b) *Anglo-Continentale Treuhand, A. G.* v. *St. Loui Southwestern Railway Co.*, 81 F. (2d) 11 (C. C. A. 2d 1936), cert. den. 298 U. S. 655 (1936), is the decision re ferred to and relied upon by the Court of Appeals in settling the law in New York to the effect that the Joint Resolution does not apply to the foreign money alternatives containe in multiple currency clauses.

In that case, Judge Learned Hand, writing for a unanimou Circuit Court of Appeals for the Second Circuit, in an actio upon coupons detached from the bonds involved in No. 38 expressly rejected the reasoning of the majority of the Ap pellate Division in the *City Bank* case (*supra*), and adopte the reasoning of Judge Lindley in *McAdoo* v. *Souther Pacific Co.* (*infra*) and the reasoning of the dissenting opin ion of Mr. Justice Merrell in the *City Bank* case, using th following language:

> "Judge Lindley in *McAdoo* v. *Southern Pac. C*
> (D. C.) 10 F. Supp. 953, took our view; the Appe
> late Division of the Supreme Court of New York b
> a majority of four to one decided otherwise. *Cit*
> *Bank Farmers' Trust Co.* v. *Bethlehem Steel Co.*, 24
> App. Div. 634, 280 N. Y. S. 494. We are not pe
> suaded by the reasoning of the majority."

Other language from this well-reasoned opinion is else where quoted in this brief.

The judgment in the *St. Louis Southwestern* case was pai in full with interest, and up to the present time this is th only case which has been litigated to the ultimate cour to which it could possibly go.

(c) As indicated, Judge Hand's excellent opinion in th *St. Louis Southwestern* case cited with approval *McAdo*

v. *Southern Pacific Co.*, 10 Fed. Supp. 953 (N. D., Cal., S. D., 1935), (reversed, solely on jurisdictional grounds, by the Circuit Court of Appeals, 9th, and remanded because the amount involved in the suit was less than $3,000, 82 F. [2d] 121 [1936]). That was a suit for a declaratory judgment by a *domestic* upon coupons similar to those at bar, issued by one of the companies in the railroad system of one of the Respondents (Southern Pacific Co.) in No. 384. Judge Lindley, in a clear and convincing opinion, held that even a domestic was entitled to recover the value of foreign moneys if payment in such foreign moneys was selected by him.

In referring to *Norman* v. *Baltimore & Ohio R. Co., supra*, Judge Lindley said (at p. 953):

> "In the Gold Clause cases, *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, * * * the court was dealing with legislation that expressly forbade contracts payable in gold coins of the United States. There, the court said: 'The Congress has enacted an express interdiction' [citations]. The question with which the court here is primarily concerned is whether that interdiction expressly or impliedly includes contracts payable in guilders of the Netherlands of francs of Switzerland."

and, in discussing the Joint Resolution, he said at page 954:

> "The unambiguous provision of the resolution then, is to declare unlawful clauses requiring payment in gold of any obligation 'payable in money of the United States,' in 'coin or currency of the United States.' The act by its own language carefully limits its force to 'obligations payable in money of the United States,' and purports to deal only with 'coin or currency of the United States.' The bar of illegality, by its own terms, is defined and limited in effect. Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries. The preamble of the resolution so indicates. If we give full force and effect to the unambiguous language employed, we are unable to point out any words that disclose any intent

to extend the prohibition further than that language clearly indicates. Consequently, the rights and liabilities of the parties in the contracts under consideration, not being within the legislation, are the same as if the resolution had never been adopted."

(d) In the face of Judge Lindley's decision in the *McAdoo* case, and of the opinion in the *St. Louis Southwestern* case, the Circuit Court of Appeals in No. 384 placed a different construction upon the Joint Resolution, apparently—we believe erroneously—basing its decision (in part at least) upon the circumstance that this railroad obligor is in reorganization. 98 F. (2d) 160, at 165.

We respectfully submit that the reasoning of Judge Hand in the *St. Louis Southwestern* case, and of the New York Court of Appeals in the *Zurich* case (No. 590), and in the case at bar (No. 591), truly and correctly construes the Joint Resolution so far as concerns its impact upon the foreign money alternatives contained in the multiple currency clauses of the coupons sued upon.

The Court of Appeals, in making the decisions below in No. 590 and in the instant case (No. 591), had before it the then most recent decision (that of Circuit Court Judge Stone in No. 384) as well as all the preceding decisions in its own and the other jurisdictions in which multiple currency clauses had come up for decision; it had itself decided the *Norman* and the *Inversiones* cases in a manner which had received affirmance and approval in this Court; it also had the decision of this Court in the *Holyoke* case. With all these decisions before it, it correctly found the opinion of Judge Hand in the *St. Louis Southwestern* case, and the opinions of Mr. Justice Hofstadter and of the dissenting justices in the Appellate Division in the instant case, to represent the proper interpretation of the Joint Resolution, so far as concerns its non-applicability to the foreign money alternatives contained in multiple currency clauses.

It is the considered view of this Court (whose construction of the Joint Resolution[29] has previously been approved by this Court) which we now urge—to the effect that the Joint Resolution does not apply to the foreign money alternatives contained in multiple currency clauses, especially when the coupons are owned by foreigners and payment of foreign currency is demanded abroad.

In the *St. Louis Southwestern* case plaintiffs expressly conceded (see pp. 35-36 of appellees' brief in the Circuit Court of Appeals; p. 3 of respondent's brief in opposition to petition for writ of certiorari) that the instruments there sued upon were acquired after the passage of the Joint Resolution, but judgment was nevertheless granted to the plaintiffs. The same express concession was made by Respondents at bar (see p. 8 of their brief in the Court of Appeals) and the fact conceded is as immaterial now to the questions at bar as it was then.

(II) Respondents are foreigners, and the Joint Resolution does not purport to affect, and cannot affect, payments in foreign moneys to be made to foreigners abroad.

We have heretofore pointed out under Point B(3), pp. 35 *et seq., supra,* that legislation is presumptively territorial only and is confined to the limits over which the law-making power has jurisdiction; and that therefore the Joint Resolution can in no way affect the coupons here sued upon, which constitute contracts performable and payable to foreigners in a foreign country in the lawful money of that country.

The decision of the Court of Appeals below did not distinguish between the rights of foreigners and domestics, but may be construed as a holding generally that the Joint Resolution did not prohibit the payment of guilders in Holland upon the coupons sued upon.

Nevertheless, in each and every of the (now overruled) decisions of the New York courts which denied full recovery (save only in the decision of the Trial Justice in the *Zurich* case, No. 590) a distinction was recognized between the rights of foreign and the rights of domestics.

[29] In respect of its impact upon gold clauses.

Even should this Court hold that the Joint Resolution applies to the foreign money alternatives in the multiple currency clause of the coupons here sued upon when in the hands of domestics (which we submit, however, that it does not), the history of the Joint Resolution itself, the opinions of various of the Judges who have passed upon the question, the expressions of Debtors having adverse interests, and the expressions of the very Petitioner at bar, show that it has always been recognized that the Joint Resolution could not affect, and was not intended to affect, the rights of foreigners to recover foreign moneys abroad.

Thus, in the *City Bank* case, the following language appears at page 636 of the majority opinion:

> "It is not contended by the appellant[30] that the holders[31] of these coupons who are subjects of England and Holland, respectively, are governed by the terms of the Joint Resolution. In fact, the affidavits show that all payments have been made to *bona fide*[32] holders in foreign countries in accordance with the terms of the agreement."

In *Anglo-Continentale Treuhand, A. G.* v. *Southern Pacific Co.*, 165 Misc. (N. Y.) 562 (1936) (aff'd without opinion 251 App. Div. 803 [1st Dept., 1937]; motion for reargument or leave to appeal denied 251 App. Div. 885 [1st Dept., 1937]), the following appears in Mr. Justice Valente's opinion below (pp. 563-564):

> "In the case of an alien holder demanding payment abroad in a foreign currency, *both the State and Federal courts are united in holding that the payment is not forbidden by the joint resolution, even though the transfer from a domestic to the alien holder occurred after the passage of that legislation.* (*Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern R. Co.*, [C. C. A.] 81 F. [2d] 11; 105 A. L. R. 636; certiorari denied, *Henwood* v. *Anglo-Continentale*

[30] The appellant in that case is the Petitioner at bar.

[31] Referring to holders other than the plaintiff in that case.

[32] "Bona fide," not in the sense conventionally applied to negotiable instruments, but in a restricted sense treated and used by Petitioners to refer to purchasers prior to June 5, 1933.

Treuhand, A. G., 298 U. S. 655; 56 S. Ct. 675; 80 L. Ed. 1381; *Nederlandsche Middenstandsbank* v. *Bethlehem Steel Co.*, N. Y. L. J. June 13, 1936, p. 3029.)"

Respondent Henwood in No. 384, in its brief to the District Court, likewise drew a distinction between the rights of foreigners and the rights of domestics. For instance, it urged as a ground for denying the claim of the Guaranty Trust Company in No. 384, that Claimant is a United States corporation, this claim is presented in behalf of American owners, and recourse made to an American court for the allowance of the claim" (Brief of Henwood to District Court, p. 23).

Discussing the *City Bank* case, that same Respondent expressly recognizes that the only question there presented was as to "the right of *an American citizen* to recover judgment for an amount in excess of the United States money value * * *" (*ibid.*, p. 30).

At page 31 of the same brief that Respondent concedes that the decision in the *City Bank* case "pointed out that where *domestic* holders of bonds and coupons were concerned, they were also 'within the spirit and intent of the Joint Resolution,' * * *."

At page 33 he distinguishes the *St. Louis Southwestern* case on the ground that

> "The case is a holding by the Second Circuit that a FOREIGN HOLDER of bonds and coupons, *no matter when acquired*, may recover judgment in American courts for the value of foreign moneys called for by the foreign money options contained in the coupons."

Furthermore, in his attempt to avoid the effect of the *St. Louis Southwestern* case, that Respondent used the following language at page 33 of its brief to the District Court:

> "There is no necessary inconsistency between the holding of the Second Circuit Court of Appeals, dealing with the rights of foreign holders of bonds to collect the interest in guilders, and the holding of the New York Appellate Division dealing with the rights of domestic holders of such bonds."

A similar statement is made in his brief to this Court in No. 384 (see p. 57 thereof).

This very Petitioner itself, discussing the rights of foreign holders in the *City Bank* case, made the following statement at page 25 of its brief to the Appellate Division:

> "We are not concerned in this case with the rights of a foreign resident holder, whether presented in a foreign court or indeed in an American court. The defendant is in fact voluntarily paying guilders to bona fide foreign holders (who were such before the Joint Resolution) and is thereby giving effect to the spirit of the guilder payment alternative, which was, of course, that Dutch holders should receive payment in Amsterdam in their own currency."

And again at page 37:

> "The guilder provisions were added solely for the convenience of foreign holders."

All this comes very close to being (if it is not actually—which we contend it is—) a recognition by Petitioner and other debtors similarly situated, that foreign holders are in any event entitled to recover the values of foreign moneys on alternative multiple currency clauses. It recognizes a distinction between foreigners and domestics, just as Petitioner itself, in its brief to the Appellate Division in the *City Bank* case, recognized a distinction between foreigners and domestics, and just as the Appellate Division recognized the same distinction, even though denying recovery to the domestic there involved.

All concerned have thus recognized, and there should be recognized, the fact that the Joint Resolution does not affect and was not intended to affect payments on the foreign money alternatives in foreign currency to foreigners abroad.

Respondents are all foreigners. Should any holding be made by this Court to the effect that the Joint Resolution impairs the guilder clause of the coupons sued upon in the hands of domestics, this Court should nevertheless expressly recognize the claims and rights of these foreign holders.

Our conclusions in this regard are strengthened by the fact that there was a simultaneous, separate offering of these

bonds in Holland, at the same time when these bonds were offered in America and England; the price for public subscription in the United States was 91½ and accrued interest (R. 78); the price in Holland was 90¾ (R. 82); and that a separate circular in the Dutch language (the Dutch text of which was omitted in printing but the English translation of which appears at R. 81 *et seq.*) was issued to prospective purchasers in Holland.

Without waiving our contention that the Joint Resolution does not affect and never was intended to affect multiple currency clauses in any event, we point out the significant fact that, even as applied to "gold clauses" which the Joint Resolution did intend to affect, it was the "discrimination between citizens" which was the evil intended to be remedied.[33]

Congressly clearly recognized its legal inability to affect the rights of aliens abroad, either *vis-a-vis* other aliens or *vis-a-vis* citizens of the United States, and it was undoubtedly for this reason that Judge Hand, in the *Southwestern* case, states (at p. 12) that if the Resolution had meant to prescribe otherwise, it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity.

That foreigners (and even domestics resident abroad) were not *intended* to be affected even by the striking of the "gold clause" by the Joint Resolution (which was the only thing which the Joint Resolution intended to effect) is further evidenced by the Act of March 26, 1934, 48 Stat. 466, as amended, August 14, 1937, 50 Stat. 641, 5 U. S. C., Sec. 118-c, appropriating $7,438,000 to meet losses sustained by consular officers and employees in foreign countries due to appreciation of foreign currencies in their relation to the American dollar; and by the Philippine Act approved June 19, 1934, 48 Stat. 1115, appropriating $23,862,750.78 in favor of the Treasury of the Philippine Islands.

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[33] See pages 46-47 of Petitioner's (Respondent below) brief to the Court of Appeals in the *Zurich* case, quoting Mr. Steagall, Chairman of the Committee in charge of the Resolution in the House of Representatives, Cong. Rec., 73rd Cong., 1st Session, at page 4586.

> "being an amount equal to the increase in value (resulting from the reduction of the weight of the gold dollar) of the gold equivalent at the opening of business on January 31, 1934, of the balances maintained at that time in banks in the continental United States by the Government of the Philippine Islands for its gold standard fund and its Treasury certificate fund less the interest received by it on such balances."

Congress thus specifically had in mind the fact that foreign currencies might appreciate[34] in value, and its failure to legislate in respect of such foreign currencies, in the light of the Joint Resolution and the legislation above mentioned, shows that it must have specifically intended to exclude payments in foreign currencies to foreign residents (or even to domestics) from the operation of the Joint Resolution.

If, for instance, let us say, Mexico had passed a "Joint Resolution," it is inconceivable that any weight would be attached to the argument that American citizens could not recover dollars on a multiple currency Mexican coupon, simply because a specified amount of Mexican currency might also be referred to on the face of the coupon.

When the Mexican Government recently seized the property of American citizens in Mexico, the United States Government made diplomatic representations in remonstrance thereagainst.

The same international policy which insists upon foreign governments and aliens observing and preserving the rights of American citizens abroad should be exercised to observe and preserve the rights, arising abroad, of aliens, resident abroad, against American citizens, even though the enforcement of such rights be sought in the courts of the United States.

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[34] In fact, Section 1 of the Act authorizing the President to devalue the dollar, Title III of the Act of May 12, 1933, 48 Stat. 51, as amended, 31 U. S. C., Sec. 821(2), specifically refers to the "depreciation" of foreign currency, and nowhere is it indicated that any danger is apprehended from "appreciation" of such currency.

Petitioner itself states (e. g., at pp. 39, 40, 42, 43 of its brief) that it was the "depreciation"—(not the "appreciation")—of foreign currencies which Congress intended to accomplish. It is somewhat anomalous, therefore, to say the least, for it to take the position that, because the guilder is worth more now than on the day the Joint Resolution was passed, payment in guilders is in violation either of the spirit or of the intent of the Joint Resolution.

Equally, the foreign holder of coupons of an American corporation, payable in Holland in guilders, should be entitled to recover from the debtor in the courts of America to "the full extent of the maker's promise to pay." Cf. *Security-First Nat. Bank of Los Angeles et al.* v. *Rindge Land & Navigation Co. et al., supra.*

In an anticipatory attempt to overcome the force of the foregoing arguments, Petitioner devotes considerable space in its brief (pp. 15, 30, 31) to a discussion of *The Titanic*, 233 U. S. 718 (1914), concluding, upon its construction of that case, that this Court may decline to enforce the guilder clause "when to do so would conflict with domestic public policy." The short answers to Petitioner's argument are: (1) There is no domestic public policy inhibiting the payment of guilders to foreigners abroad; and (2) *The Titanic* case arose under an admiralty statute, which specifically provided for limitation of liability if suit therefor were brought in American courts;[35] and (3) *The Titanic* case is not applicable, or even analogous, because at bar there is no analogous American statute specifically (or even impliedly) prohibiting the payment demanded by Respondents. As its premise, Petitioner assumes its fallacious conclusion (viz., that payment to foreigners abroad in guilders is inhibited), and, reasoning therefrom, naturally arrives at its erroneous conclusion that Respondents cannot recover.

It completely ignores the well-settled rule of statutory construction set forth in *Sutherland, Statutory Construction, supra*, Sec. 546, p. 1019, as follows:

> "All statutes for interference with legitimate industries or the ordinary uses of property, or for its removal or destruction for being a nuisance or contributory to public evil, are treated with a conservative regard for the liberty of the citizen[36] in his laudable business, and in the innocent enjoyment of his possessions, and generally the rights of property. Such

[35] So admitted by Petitioner in its brief in its footnote on page 30.

[36] (Footnote ours.) Aliens are entitled to the same protection (see p. 74, *infra*).

> interferences are cautiously justified on principles of the common law, and only in cases of imperative necessity (citing *Mayor etc. of New York* v. *Lord*, 18 Wend. 128; *Respublica* v. *Sparhawk*, 1 Dall. 357; *Russell* v. *Mayor, etc.*, 2 Denio 461, 474) or under valid statutes plainly expressing the intent" (citing many cases).

There is no "imperative necessity," nor are there "valid statutes plainly expressing the intent," to construe the Joint Resolution in the manner contended for by Petitioner—indeed, quite the contrary is the case.

In light of the foregoing, Judge Learned Hand's compelling statement in the *St. Louis Southwestern* case (at p. 12) that, in the absence of the clearest immanent purpose a construction of the Joint Resolution favoring the position taken by Respondents at bar would be adopted, becomes particularly significant.

Any refusal to permit such recovery would constitute a confiscation by government decree of the rights of these foreign holders for the benefit of particular domestic debtors (see Point B(8), *supra*).

The mere fact that Respondents are aliens does not deprive them of their constitutional rights. *Wong Wing* v. *United States*, 163 U. S. 228 (1896); *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931).

(12) Summary Statement showing non-applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses.

This case, in its true aspect, does not involve the construction of the Joint Resolution at all, because the Resolution does not apply to the foreign currency alternatives contained in multiple currency clauses. The coupons sued upon are not within the legislation.

The Joint Resolution not being applicable, the rights and liabilities of the parties at bar are the same as if it had never been adopted. The question, therefore, resolves itself into a simple problem in contracts.

"When a contract involves a promise to do one thing or another at the option of either party the place of performance is undetermined until the option is exercised, and it then becomes the place of performing the promise which is chosen by the party having the option." *Restatement, Conflict of Laws,* Sec. 356(1).

The number of guilders is specifically set out in the bonds and coupons. Bondholders who elect to receive the same could get no lesser or larger number of guilders than set forth therein despite the fluctuations of the various currencies. If a holder of Lackawanna bonds chose francs, for instance, he could get no more units of that currency because francs had depreciated. Petitioner's reasoning would compel it to pay $25 for each coupon in America, even though a French citizen, for reasons of his own, might have elected to take francs in Paris, worth less than 25% of the dollar amount. Such a result shows the fallacy of any such argument.

Petitioner endeavors to create an ambiguity by torturing the coupons into reading as though they are instruments payable only or primarily in "gold dollars," whereas in fact, by the exercise of the choice of guilders in Holland, they become payable *solely* in a fixed number of such guilders, not measured by nor in relation to (a) "gold" or (b) "a particular kind of coin or currency of the United States" or (c) "an amount in money of the United States measured thereby."

It is an obvious fact that these bonds and coupons are drawn by the issuing corporation and that the holders thereof had no part in the composition thereof.

We respectfully submit that there is no ambiguity; nevertheless, if any exists, the instruments must be construed against Petitioner, whose words they are. *Williston on Contracts,* Sec. 621, (1938) and cases cited in note; *Restatement, Contracts,* Sec. 236(d); *ibid.,* Sec. 325(2); *Rothschild* v. *Rio Grande Western R. Co.,* 84 Hun 103, 109 (1st Dept., 1895), aff'd. 164 N. Y. 594 (1900).

Neither the *Norman* case, nor the *Inversiones* case, nor the *Holyoke* case impair the conclusions reached by us. In fact, those decisions actually support our position. Only the "gold" and "gold coin" *terms* attached to the dollar amounts were stricken in those cases, the resulting and remaining promises remaining unaffected. The same action at bar results in a valid and binding obligation by Petitioner to pay the guilders here sued for, and compels the affirmance of the judgment appealed from.

Concluding this point, we adopt for our own summary the following masterly statement of Professor Nussbaum (84 U. of Pa. L. R., at pp. 578-579) in respect of the inapplicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses:

> "To sum up: The multiple currency situation under both legal and legislative views is wholly different from the gold clause situation. It cannot be presumed therefore, that Congress, in impairing the gold clauses, intended to reach the multiple currency clauses. Hence, an American holder of a multiple currency bond does not evade the Joint Resolution when choosing payment in foreign currency under the terms of the bond. Even less does he directly violate the Resolution since its text is unambiguously confined to gold obligations. No true interpretation of the Joint Resolution can ever yield a different result. It has been said that the Joint Resolution is poorly drafted. However, compared with the numerous foreign statutes abrogating or encroaching upon gold clauses, the American law, which in a remarkable way utilizes foreign doctrines, is a model of carefulness. Perfect clarity is not missing with regard at least to multiple currency clauses. But still if there were an ambiguity in the text the Resolution would not be applicable to the multiple currency situation for the very material reasons expounded above."

POINT C.

(1) The place and medium of payment of the coupons were at the holder's option, and the obligor must discharge its indebtedness as the holder elects.

(2) An obligation in terms of the currency of a country takes the risk of currency fluctuations, and whether debtor or creditor profits, the law takes no account of it.

(3) As a result of Respondents' election, the law of the place of performance (Holland) governs, and under that law Respondents' choice of the medium of payment is legal.

(4) Respondents are entitled to recover in full, as held by the Court of Appeals, whether American or Dutch law be applied.

(1) The rights and liabilities of the parties in the case at bar, not being within the legislation, are the same as if the Joint Resolution had never been enacted. *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co., supra; McAdoo* v. *Southern Pacific Co., supra,* at p. 954.

When an alternative contract has ceased to be alternative by reason of an election by the party having the choice, a breach as to the one remaining alternative occurs in the same way as if the contract had originally provided for only that performance. *Restatement, Contracts,* Sec. 325(2).

The fact that one alternative is or becomes impossible of performance does not excuse the promisor from performing that which remains possible, *Williston on Contracts,* Sec. 1961 (1938); and if, before the breach, all the alternatives but one are eliminated by impossibility, illegality or otherwise, the contract ceases to be an alternative one and damages for a breach are measured according to the single performance now required. *Restatement, Contracts,* Sec. 344, Comment (b). See, also: *Restatement, Conflict of Laws,* Sec. 364, and Sec. 356(1).

Furthermore, the rule of conflict of laws is that all matter connected with the performance of a contract are regulate by the law prevailing at the place of performance. *Scudde* v. *Union Natl. Bank*,[37] 91 U. S. 406 (1875); *Union Nationa Bank* v. *Chapman*,[37] 169 N. Y. 538 (1902), at 543; *Lass* v *United Steel Works Corp.*, 166 Misc. (N. Y.) 465 (1938), a 470; *Restatement, Conflict of Laws*, Sec. 360; *Pan-Americ Securities Corporation* v. *Krupp, supra; Anglo-Continental Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.*, *supra*. Accord: *Richard* v. *American Union Bank*, 241 N. Y 163 (1925), at p. 167; *Matter of James*, 248 N. Y. (1928), a p. 6; *Tillman* v. *Russo Asiatic Bank*, 51 F. (2d) 1023, 102 (C. C. A., 2nd, 1931); *cf.: Seeman* v. *Philadelphia Warehou Co.*, 274 U. S. 403 (1927).

(2) An obligation in terms of the currency of a coun takes the risks of currency fluctuations and whether credito or debtor profits by the change, the law takes no accou of it. *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, 51 (1926); *Hicks* v. *Guinness*, 269 U. S. 71, 80 (1925).

Even if otherwise applicable to the foreign money alte natives of the multiple currency clauses (which we deny see Point A, *supra*), the Joint Resolution cannot extend t contracts to be performed or to instruments payable in Ho land (see cases cited on page 35, *supra*).

There is no contention made, nor can there be, that Ho land either applies the Joint Resolution or has the Dutc equivalent of a Joint Resolution.[38]

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[37] Cases involving negotiable instruments payable at a place other than t place where made.

[38] In fact, not only is Holland without a "Joint Resolution" but it has bee specifically held by the Supreme Court of The Netherlands High Council a decision rendered March 13, 1936 (official citation not available), reversin the judgment of the Appeal Court of The Hague, that bonds of the Roy Dutch Company were not affected by the Joint Resolution. *Vereeniging voo den Effectenhandel* (plaintiff-appellant) v. *Nederlandsche Maatschappy t Exploitatie van Petroleumbronnen in Nederlandsche-Indie* (defendant-respon ent). Said decision was based upon an opinion of the Attorney General t the Supreme Court of The Netherlands on the cases concerning the loa of the Royal Dutch and the Batavsche.

Specifically, also, attention is called to the case of *The Limited Liabili Company N. V. Anglo Continental Trust Maatschappij, of Rotterdam*, plai tiffs v. (*1*) *The Bethlehem Steel Company, of South Bethlehem* (Pen U. S.), and (*2*) *The Bethlehem Steel Corporation, of Newark* (*N. J., U. S.* defendants, decided by the District Court of Rotterdam, 2nd Divisio

An analogous situation was recently considered in England. In that case, Canada, in 1937, having abrogated gold clause obligations (and at bar we are not concerned with the "gold clause" of the instruments—only with the foreign currency alternative of the multiple currency feature), a foreign holder, having exercised its option to receive interest payments in London, sued in England for principal and interest measured by the gold clause of the bond which provided for payment in Canadian gold dollars in Canada or in sterling in London. The Court of Appeal held that since the contract was performable in England—the holder having elected performance in England—the English law governed and required full payment according to the gold clause. *British & French Trust Corporation, Ltd.*, v. *New Brunswick Railway Co., Ltd.*, 54 The T. L. R. 172 (1937) (Court of Appeal) (affirmed by the House of Lords, December 13, 1938, 55 The Times L. R. 260).[39]

At bar, the payment chosen by Respondents was lawful when the instruments were issued; it is lawful to-day in Holland, the place of performance, when and where performance is due. It is lawful in America to-day.

(3) Articles 1308-1313 of the Dutch Civil Code provide that in the case of alternative obligations, where the choice has been left to the creditor, if one of the two things has perished or can no longer be delivered, the creditor is entitled to the other (R. 51).

January 15, 1936 (official citation not available), based upon 7 coupons of the very issue now before this Court, wherein the said District Court of Rotterdam held that the Joint Resolution did not apply to the multiple currency features, and "condemned" this Petitioner to pay at Amsterdam the sum of 42.25 guilders in respect of each coupon. While said judgment was a "default" judgment, and the defendants were not represented in court, nevertheless it reviews and gives consideration to the essential facts, and expresses the Dutch law upon the subject.

[39] For other English decisions on currency questions to the effect that the law of the place of performance will govern, see: *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, 50 The T. L. R. 147 (1934); *Rex* v. *International Trustee for the Protection of Bondholders, A. G.*, 53 The

The choice was left to the creditors at bar and they exercised their choice to take guilders in Holland. Such payment was therefore lawful there.

(4) It is thus apparent that, whether the coupons are construed according to New York law, or whether Conflict doctrines be applied and the instruments are construed according to Dutch law, the election by Respondents to demand and receive guilders in Holland is valid and binding, and Petitioner must pay the coupons there upon Respondents' demand, or respond in damages in lawful money in a suit in this country for the value of the guilders refused, as of the appropriate date. Respondents are accordingly entitled to recover the full amount sued for.

As well stated by Judge Hand in his opinion (p. 12) in the *St. Louis Southwestern* case, *supra:*

> "* * * by the law of most civilized countries the legality of the performance of a contract depends upon the law of the place of performance, and a contract is enforceable, if lawful by the law of the place of making when made, and if the performance is lawful by the law of the place of performance when due. Certainly that is true of our own law. Restatement of Conflict of Laws, §360. If the resolution had meant to prescribe otherwise, **it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity;** we are justified in insisting that a statute must make such an intent plain beyond any doubt."

The Joint Resolution certainly does not make any such intent "plain beyond any doubt". To the contrary, payment of foreign moneys abroad is not even mentioned therein, much less inhibited; and its clear wording excludes any as-

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T. L. R. 507 (1937). Cf. *Feist v. Societe Intercommunale Belge d'Electricite*, 50 The T. L. R. 143 (1934). Cf., also, *Case of Serbian Loans*, Perm. Court of Int. Just., Series A, No. 20 (1929); *Case of the Brazilian Loans*, id., No. 21 (1929). See, also, *Dicey, Conflict of Laws* (2d Ed.), 563.

For an interesting decision on the non-applicability of the Canadian "Joint Resolution," see the case of the Amsterdam Stock Exchange against French National Mail, decided by Tribunal Civil de la Seine, 1re Ch., November 16, 1938 (—no official citation available—reported in Gazette du Palais Journal du Soir Judiciaire Quotidien, November 26, 1938, p. 3), holding Holland to be the place of performance (the prospectus and offering circular mentioned Holland) and ordering a French corporation to pay the value of Dutch guilders.

sumption that such payment was intended to be interdicted thereby.

Respondents, choosing guilders in Holland, are entitled here to recover the full value thereof, whether American or Dutch law be applied.

POINT D.

The functional approach to Petitioner's interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

Respondents of course agree, without argument, that if a holder of a multiple currency coupon presents the same in the United States and demands gold dollars, Petitioner's obligation in respect of the coupon would be fully discharged by the payment of an equal number of present lawful American dollars. This would be strictly according to the tenor of the instrument itself, the demand having been made in America, the currency selected being coin or currency of the United States, and the Joint Resolution simply striking the "gold coin" term from the instrument, and permitting the payment of the same number of present lawful dollars as is exactly specified in the instrument itself (say, $25 in currency of the United States in the case of a typical coupon).

Let us, however, apply the pragmatic test to Petitioner's interpretation of what happens or should happen upon presentation of the same coupon in Amsterdam, Holland, and demand for the specific number of foreign monetary units expressed in the instrument (in the typical case, 62.25 guilders):

(1) May the debtor tender, in Amsterdam, Holland, $25 in currency of the United States for each coupon of 62.25 guilders and thereby fully discharge its obligations on the coupon?

(2) May the debtor tender, in Amsterdam, Holland, for each coupon that number of guilders (less than 62.25) which $25 in currency of the United States would purchase in Holland?

(3) May the debtor refuse to make any payment at all in Holland and insist that it has the right to pay the coupon at its office or agency *in the United States*, instead of in Holland, the place of payment selected by the holder (in whom is vested the choice of currencies and the choice of the place of payment)?

(4) If the choice of the place of payment thus passes to the debtor, may the debtor pay *in the United States* $25 in currency of the United States, and thereby discharge the obligation created by the demand in Holland for the payment of 62.25 guilders in Holland?

(5) If the choice of the place of payment thus passes to the debtor, may the debtor pay in the United States that number of Dutch guilders (less than 62.25) which $25 in currency of the United States would purchase, and thus discharge the obligation to pay 62.25 guilders in Holland created by the holder's demand in Holland?

(6) If the choice of the place of payment thus passes to the debtor, is the foreign holder, for whom the foreign places and currencies of payment were more particularly provided, forced to make presentation and demand in America?

(7) Must such last-mentioned presentation and demand be for payment in dollars?

(8) If the reasoning adopted by Petitioner is sound, is the entire coupon, as well as each and every provision thereof, and the obligations thereof, void, and, if so, is the debtor relieved from any payment thereon whatever?

In asserting (in effect) that it is entitled to tender in the United States $25 in currency of the United States for each coupon of 62.25 guilders (although payment thereof was demanded in Holland in 62.25 guilders in Dutch currency) (i. e., in adopting Nos. 3 and 4 above) Petitioner has failed to consider or answer the other very material questions propounded above.

And yet if the burden of Petitioner's contentions is to prevail, all the above questions must be answered in the affirmative, though confusion worse confounded would result. To state the questions and to assume the affirmative answers made necessary by Petitioner's interpretation of the Joint Resolution, is to state a complete refutation to Petitioner's arguments at bar, and to disclose their fallacy.

Congress could never possibly have anticipated or intended any such results. Certainly there is no word or syllable in the Joint Resolution that would lead any legislator, or any court construing the legislation, to believe that any such result was anticipated or intended. The debates in Congress contain no word or syllable that would indicate that any such result was or could have been anticipated or intended. The Joint Resolution itself expressly limits its impact to (a) "gold" or (b) "a particular kind of coin or currency of the United States" or (c) "an amount in money of the United States measured thereby." It does not affect and was not intended to affect any payments of foreign monetary units, either in the United States or abroad. The only tenable and reasonable construction of the Joint Resolution is that contended for by Respondents.

The functional analysis above—an analysis necessary and vital to the correct interpretation of the Joint Resolution—leads unmistakably and irresistibly to the conclusion that the Joint Resolution does not affect the foreign money alternatives contained in the multiple currency coupons sued upon.

POINT E.

Whatever may be the decision of this Court as to the general application of the Joint Resolution to foreign money alternatives contained in multiple currency clauses, the judgment appealed from should be affirmed as to Respondents Anglo and Mondiale.

(1) Respondents may urge all grounds for sustaining the judgment appealed from, whether or not raised by the petition.

While Petitioner may urge upon this Court only the questions presented in its petition. *Guaranty Trust Company of New York* v. *United States*, 304 U. S. 126 (1938). Respondents may nevertheless urge all other grounds to sustain the judgment appealed from. *Langnes, etc.* v. *Green*, 282 U. S. 531, 538-539 (1931); *Story Parchment Co.* v. *Paterson Parchment Paper Co. et al.*, 282 U. S. 555, 560 (1931). Accordingly, we urge that, irrespective of any decisions in other cases on the multiple currency clauses, the judgment appealed from should be affirmed as to Respondents Anglo and Mondiale because the issues of law and fact herein involved have heretofore been adjudicated between them and Petitioner in a prior action.

(2) The Trial Justice properly took judicial notice of the "First Action."

The Trial Justice took judicial notice of the "First Action", which involved questions of law and fact similar to those involved herein. See description of "First Action," pp. 6 *et seq., supra;* see decision of Trial Justice in the instant case (R. 86). In doing so, he applied accepted principles of judicial notice, viz., that the Court takes judicial notice of its own records in the same and in related cases. *Slater* v. *Slater*, 208 App. Div. 567, 571 (1st Dept., 1924), aff'd without opinion 240 N. Y. 557 (1925); *Matter of Goldowitz*, 153 Misc. (N. Y.) 182, 184 (Surr Ct., Kings Co., 1934); *Matter of Surpless*, 143 Misc. (N. Y.) 48, 50 (Surr. Ct.,

Kings Co., 1932) (citing many cases); *Matter of Clarke,* 145 Misc. (N. Y.) 660, 665 (Surr. Ct., Orange Co., 1932) (citing many cases); *Devine* v. *Melton,* 170 App. Div. 280, 282 (1st Dept., 1915); *Matter of Ordway,* 196 N. Y. 95, 97 (1909); *Shaw* v. *Shaw,* 155 App. Div. 252, 253 (2d Dept., 1913); *Silverstein* v. *Brown,* 153 App. Div. 677, 680 (1st Dept., 1912).

The courts of New York have even gone so far as to take judicial notice in one proceeding of the fact that one of the parties thereto was acting as a reorganization committee in entirely separate suits affecting other properties, pending in the same Court, *Clinton Trust Co.* v. *142-144 Joralemon Street Corp.,* 237 App. Div. 789, 792 (2nd Dept., 1933); and "of the large number of rate cases heretofore considered by the courts where experience has demonstrated the magnitude of the labors involved and the length of time required to analyze intelligently and accurately the technical evidence presented." *City of New York* v. *Interborough Rapid Transit Co.,* 134 Misc. (N. Y.) 827, 832 (Supreme Ct., N. Y. Co., 1929).

See, further: *Matter of Transfer Penalty Cases,* 46 Misc. (N. Y.) 579, 581 (App. Term, Sup. Ct., 1905).

Cf., for similar doctrines in other States, *Danforth* v. *Egan,* 23 S. D. 43 (1909), where the Supreme Court judicially noticed its own record in another proceeding disbarring the appellant as an attorney. *Pickens* v. *Coal River Boom & Timber Co.,* 66 W. Va. 10 (1909).

Furthermore it is held in New York that if judicial notice is taken, the complaint will be deemed expanded to the extent of the matter judicially noticed. *Walsh* v. *Trustees of New York and Brooklyn Bridge,* 96 N. Y. 427, 438 (1884); *City of Buffalo* v. *New York Central R.R. Co.,* 125 Misc. (N. Y.) 801, 804 (Sup. Ct., Erie Co., 1925); *First National Bank of Genoa* v. *American Surety Co.,* 239 App. Div. 282, 284 (4th Dept., 1933).

Thus, there being an identity of trial justices, of subject matter, of plaintiffs (so far as concerns Anglo and Mondiale), of defendant, of courts and of issues of fact and law involved—all of which was recognized by the Trial Justice—

the complaint at bar is deemed expanded to the extent of judicially noticing all of the records in the "First Action."

The complaint thus having been expanded, the records in the "First Action" were before the Court of Appeals as well as before the courts below. *Matter of Ordway, supra.*

Under the rule established by this Court itself, the records in the "First Action" and the legal conclusions reached by the trial court in that action are therefore now before this Court. Thus, in the leading case of *Hanley* v. *Donoghue*, 116 U. S. 1 (1885), it was said (at p. 6):

> "But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here."

See also: *Renaud* v. *Abbott*, 116 U. S. 277, 285 (1886); *Chicago & Alton R.R.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 623 (1887); *Adam* v. *Saenger*, 303 U. S. 59, 63 (1938); *Cyclopedia of Federal Procedure*, Vol. 6, p. 610. Cf. *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217 (1902).

(3) The judgment in the "First Action" is *res adjudicata* between Petitioner, and Respondents Anglo and Mondiale.

The doctrine of estoppel by judgment is set forth in *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620 (1933), where the Court said at page 623:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353; *Southern*

Pacific R. Co. v. *United States*, 168 U. S. 1, 48; *United States* v. *Moser*, 266 U. S. 236, 241. Since the claim in the first suit concerned taxes for 1918 and 1919 and the demands in the present actions embraced taxes for 1920-1925, the case at bar falls within the second class."

The action at bar falls within the second class of cases referred to in the opinion in the *Tait* case. Therefore the judgment in the "First Action" is *res adjudicata* in so far as concerns Respondents Anglo and Mondiale and Petitioner and its privies on all questions presented herein affecting them, and as to those questions Petitioner is estopped from asserting the defenses and claims which it seeks to assert here. The estoppel applies to questions both of law and of fact determined in the "First Action," or which could have been urged or determined therein—in other words, the estoppel runs against Petitioner on every issue that was or might have been raised or litigated in the "First Action."

In *Beloit* v. *Morgan*, 7 Wall. 619 (1868), it was held that a judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on a question of the validity of the issue in a suit brought by the same creditor against the same town, on another part of the same issue; the parties being identical, and all objections taken by the town in the second suit having been available to it in the former one.

In *Fitch* v. *Stanton Tp.*, 190 Fed. 310 (C. C. A., 8th, 1911), it was held at page 315:

> "The identity of such questions being established, the fact that the coupons for interest here are for interest accruing later upon the same bonds, for which the coupons in the former suit were given, in no manner affects the estoppel arising from the judgment in that suit." (Citing, among others, *Southern Pacific Railway Co.* v. *United States*, 168 U. S. 1, 48 [1897]).

Even more in point is *Hickman* v. *Town of Fletcher*, 195 Fed. 907 (C. C. A., 8th, 1912). That was an action on *coupons* taken from municipal bonds. Defendant pleaded as a defense that the bonds were void because the ordinance under which they were issued was not published as required by the statutes of the State. The same parties had been before the Court in two previous actions. The first action was upon the *coupons* from $69,000 of the bonds for which the plaintiff had recovered judgment and which judgment was affirmed in *Town of Fletcher* v. *Hickman*, 136 Fed. 568 (1905). The second action was upon the first-mentioned judgment and upon interest *coupons* on the same bonds which had matured *since the commencement of the first action and also upon the coupons from three other bonds of the same series which the plaintiff had subsequently purchased* and for which the plaintiff had received judgment which was affirmed in *Town of Fletcher* v. *Hickman*, 165 Fed. 403 (1908). The action in 195 Fed. 907 was upon the judgment in the second suit and also upon the bonds from which the coupons were taken in that suit, and also upon coupons maturing upon said bonds since the commencement of the second action. The Court held that the judgments in the former actions constituted *res adjudicata*, saying at page 909:

> "The defendant seeks to avoid the effect of these prior adjudications upon the ground that the demands sued upon in this action are other and different demands or causes of action than those upon which the prior suits were brought. It may be conceded that the causes of action are different, for each bond and each coupon is a separate cause of action. The identity of the demands or causes of actions in the two suits is, however, not alone the test by which the conclusiveness of an estoppel by judgment is determined, but it is the identity of the questions in issue and actually determined in the prior action, with those involved in the action in which the prior judgment is pleaded as an estoppel. This identical question was determined by this court in the recent case of *Fitch* v. *Stanton Township et al.*, (C. C. A.) 190 Fed. 310. * * * To avoid the effect of such prior adjudication, the complainant in that suit, as the defendant does

here, contended that the coupons upon which the suit was brought were other and different demands or causes of action than those involved in the prior suit, to which the plea of estoppel would not apply. * * * *"

"The general principle deducible from these and other cases is that a question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense cannot be disputed in a subsequent suit between the same parties or their privies. And, even if the second suit is upon a different cause of action, the right, question, or fact so determined must, as between the parties or their privies, be taken as conclusively established so long as the judgment remains unmodified. This rule, said Mr. Justice Harlan, in Southern Pacific R. R. Co. v. United States, above, 168 U. S. at page 49, 18 Sup. Ct. at page 27, 42 L. Ed. 355, 'is demanded for the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.' The contention of the defendant cannot be sustained."

See, also: *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1 (1897); *United States* v. *Moser*, 266 U. S. 236 (1924); *Lumber Co.* v. *Buchtel*, 101 U. S. 638 (1879); *Werlein* v. *New Orleans*, 177 U. S. 390 (1900); *Spencer* v. *Watkins*, 169 Fed. 379 (1900); *In re Cherokee Public Service Co.*, 94 Fed. (2d) 536 (C. C. A., 8th, 1938); *The Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465 (1893); *Tuska* v. *O'Brien*, 68 N. Y. 446 (1877); *In re Baker's Estate*, 249 App. Div. (N. Y.) 265 (4th Dept., 1936); *Pray* v. *Hegeman*, 98 N. Y. 351 (1885); *Donahue* v. *N. Y. Life Ins. Co.*, 259 N. Y. 98 (1932); *Credito Italiano* v. *Emanuel F. Rosenbaum*, 271 N. Y. 583 (1936); *State* v. *Patton*, 271 Mo. 554 (1917); *B. Roth Tool Co.* v. *Champ Spring Co.*, 146 Mo. App. 1 (1909).

This Court said in *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290 (1906), where it was asserted that an answer filed in an earlier case by the Attorney General of South

Carolina failed to traverse certain facts, and that the decree was based upon such assumption——

> "But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree" (citing cases).

There is not a single issue in the case at bar that was not or could not have been raised by Petitioner in the "First Action". See: *Mitchell* v. *First National Bank of Chicago*, 180 U. S. 471 (1901); *Cromwell* v. *County of Sac*, 94 U. S. 351 (1876); *Souffront* v. *La Compagnie des Sucreries*, 217 U. S. 475 (1910).

Inasmuch as the issues of law and fact in the "First Action" were the same as those at bar, whatever the decision of this Court may be as to the applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses generally, the judgment appealed from should be affirmed as to Respondents Mondiale and Anglo on the principle of *res adjudicata*.

(4) Irrespective of any decision by this Court as to the general applicability of the Joint Resolution to the foreign money alternatives in the coupons, the judgment below should be affirmed as to Respondents Anglo and Mondiale. A supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation in whole or in part of the doctrine of *res adjudicata*.

Even should this Court decide that the Joint Resolution applies to the foreign money alternatives in multiple currency coupons, the judgment below should nevertheless be affirmed so far as concerns Respondents Mondiale and Anglo. The law and the facts having once been construed in favor of those Respondents, that construction cannot be changed in any subsequent disputes between the same parties or their privies on the same or similar issues.

Thus, in *United States* v. *Moser*, 266 U. S. 236 (1924), a naval officer sued for judgment in the Court of Claims for an instalment of pay. The facts are stated by Mr. Justice Sutherland at page 240 of the opinion, as follows:

> "* * * Three previous suits for installments of salary—the right of recovery in each depending upon this same basic question—were decided by the Court of Claims in his favor. In each, the contention of the Government was the same as it is here, viz.: that service as a cadet during the civil war was not service within the meaning of the statute. Between the first and second of these suits, in another suit brought by a different claimant, the court construed the statute otherwise and denied that claimant a right of recovery, *Jasper* v. *United States*, 43 Ct. Clms. 368; the change of opinion being made to rest upon a later act, then for the first time called to the court's attention, which, in terms, excluded the period of service as a cadet, but with a proviso that it should not apply to an officer who had received an advance of grade at or since the date of his retirement. C. 3590, 34 Stat. 553, 554.
>
> In the second and third *Moser Cases*, however, the Court of Claims declined to follow the *Jasper Case*, holding that, by reason of its decision in the first *Moser Case*, the question was *res judicata*. The present suit was decided in Moser's favor upon the same ground; and, in addition, the court reverted to the position taken in the first *Moser Case*, abandoning, as unsound, its view as expressed in the *Jasper Case*, upon the ground that the right of the officer was saved by the proviso."

The opinion further states (p. 241):

> "We find it unnecessary to consider the latter ruling, since we are of opinion that the court was clearly right in its application of the doctrine of *res judicata*.
>
> The general principles are well settled, and need not be discussed. The scope of their application depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits constitutes an absolute bar to the subsequent action. In

the latter case the inquiry is whether the point or question presented for determination in the subsequent action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353. The rule is succinctly stated in *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48:

'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'

And in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396, this Court, speaking through Mr. Justice White, said:

'The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.' And see *Myers* v. *International Trust Co.*, 263 U. S. 64.

The suits here are upon different demands; and the point at issue is to be determined by applying the second branch of the rule. The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged in favor of the claimant in the three preceding suits, viz.: whether he occupied the status of an officer who had served during the civil war.

The contention of the Government seems to be that the doctrine of *res judicta* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same

in both cases. *But a fact; question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.* That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. See *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 291; *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 358; *Scotland County* v. *Hill*, 112 U. S. 183, 187; *Southern Minnesota Ry. Ext. Co.* v. *St. Paul & S. C. R. Co.*, 55 Fed. 690, 695, 696; *Pittsford* v. *Chittenden*, 58 Vt. 49, 57; *Bigelow on Estoppel*, 6th ed., p. 112. A determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter. *Clemens* v. *Clemens*, 37 N. Y. 59, 72; *Pittsford* v. *Chittenden*, *supra*."

These conclusions are supported by the following language in *Tait* v. *Western Maryland Railway Co.*, *supra*, at pp. 625-626:

"* * *. The petitioner suggests, however, that significant facts were stipulated in the present case which were not made to appear in the former proceeding.[10] He shows that in the earlier case the Commissioner inadvertently stipulated that the first company 'may be taken as identical' with the second, whereas in the present suit the exact devolution of title from the first to the second through the foreclosure and reorganization is definitely exhibited by the stipulation of the parties. From this he concludes that the Circuit Court of Appeals might well have reached a different result on the merits, if the former case had been more fully and accurately presented. But the Circuit Court of Appeals has found that all the facts stipulated in the present cause were before it in the former one, and we accept this finding. It holds also that the former decision was based on a view of the law quite as pertinent to the bonds sold by the first company as to those marketed by the second. The petitioner may not escape the effect of the earlier

[10] Our footnote: Involving deductions for former years, and, therefore, involving a different claim or cause of action although under the same statute.

judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment. Compare *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510-511. The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding."

See, also: *Courtney* v. *Croxton*, 239 Fed. 247 (C. C. A., 6th, 1917); *Guaranty Trust Co.* v. *International Trust Co.*, 144 Misc. (N. Y.) 127 (1932).

The very right now contested by Petitioner was adjudged in the "First Action" in the New York State Court. The same questions of law and of fact were in issue. Judgment was rendered in favor of Anglo and Mondiale, which was paid in full by Petitioner.

The decision in the "First Action" is therefore conclusive as between Petitioner on the one hand and Respondents Mondiale and Anglo, on the other hand, of all the issues at bar, irrespective of any decision as to the applicability of the Joint Resolution to multiple currency clauses, and irrespective of any supervening decision thereon.

POINT F.

At all events, all Respondents are entitled to interest and costs.

The coupons sued upon are independent negotiable instruments; N. I. L., Sec. 25(5); guilders, although a commodity in the United States, are money in Holland; the reference in the coupons to the bond does not destroy their character as independent negotiable instruments; Cf. *Enoch* v. *Brandon*, 249 N. Y. 263 (1928); *Cunningham* v. *Pressed Steel Car Co.*, 238 App. Div. 624 (1st Dept., 1933), aff'd 263 N. Y. 671 (1934); there is deemed *prima facie* to have been valuable consideration; N. I. L., Sec. 50; *Newcombe* v. *Fox*, 1 App. Div. 389 (1st Dept., 1896), aff'd 154 N. Y. 754 (1897): presentment and demand are not necessary, but if the instrument by its terms is payable at a special place and the maker is

able and willing to pay it *there* at maturity according to its terms, and has funds *there* available for that purpose, such ability and willingness are equivalent to a tender of payment on his part. N. I. L., Sec. 130. Payment in guilders to Respondents on presentation in Amsterdam would have fully discharged the obligation on the instruments. N. I. L., Sec. 200(4).

Although they were payable in Holland at the election of the holders, these coupons, payable in a foreign country in the monetary unit of that country, are negotiable instruments, *Amsinck* v. *Rogers*, 189 N. Y. 252 (1907). A note payable in money or, in the alternative, in a commodity or other thing of value, is enforceable. *Dunsmore* v. *Duncan*, 57 N. Y. 573 (1874); *Hosstatter* v. *Wilson*, 36 Barb. (N. Y.) 307, 308 (1862); *Hodges* v. *Shuler*, 22 N. Y. 114 (1860); *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Ry. Co.*, *supra*.

The holder of the instrument could present the same at any time at or after maturity. N. I. L., Sec. 90 *et seq.*; *Shapiro* v. *Weber*, 220 App. Div. 667, 669 (1st Dept., 1927); *Perry* v. *Norddeutscher Lloyd*, 150 Misc. (N. Y.) 73, 74 (1934); *Lace Selling Co.* v. *Barnet Shapiro et al.*, 249 N. Y. 68 (1928); *Rubber Trading Co.* v. *Manhattan Rubber Mfg. Co.*, 221 N. Y. 120 (1917).[41]

It follows that had Petitioner been ready, able and willing to pay the number of guilders demanded in Holland it might have been relieved from the necessity of paying interest for its refusal to pay.

When the coupons became due, however, and Petitioner refused to pay the same, a new and independent duty was imposed upon it; and for the breach of that duty the law assesses interest by way of damages.

Even the Appellate Division, which refused recovery for more than the face dollar amount of the coupons, allowed interest. This was done as the result of a direction from

[41] The Dutch law is to the same effect. See:
H. R., 28 January 1921, N. J. 1921, p. 356;
H. R., 18 May 1926, N. J. 1926, p. 466;
H. R., 24 April 1931; N. J. 1931, p. 1321;
Hof den Haag, 19 October 1934, N. J. 1924, p. 1709;
R. C. Almelo, 14 April 1926, N. J. 1927, p. 24.

Mr. Justice Cohn (one of the majority Judges in that Court), which reads as follows:

> "The order should provide that plaintiffs are entitled to interest from the date the coupons were presented for payment. Neither of the proposed orders so provides. Otherwise the defendant-appellant's order is preferable as to form and substance to the extent that it allows costs and disbursements of this appeal to defendant-appellant, the successful party.
>
> The defendant's order should be revised to include interest on the amounts awarded from the date the coupons were presented for payment."

It is quite evident that one reason why even the Appellate Division below directed that interest be awarded to Respondents is that Petitioner has nowhere alleged or proved its readiness or willingness to pay at the proper place even the dollars which it concededly owed, and which it contended to be the proper amount payable in respect of the coupons sued upon.

The typical allegation in the amended answer which comes closest to a tender (but which falls short thereof) is paragraph numbered 62 thereof (R. 40), wherein Petitioner alleges that on the respective due dates of the coupons[42] it was ready, able and willing to pay the same as they respectively became due *in money of the United States* upon presentation and surrender of said coupons respectively, *at the office or agency of the Petitioner in the City of New York in said United States "as provided in said bonds and in said coupons."* Nowhere in the amended answer is there an allegation of willingness or readiness to pay even the admitted amount of dollars in Amsterdam, the place where Respondents had the right to and did present the coupons (and demanded payment in guilders). Petitioner has not contended (see p. 11 of its reply brief to the Court of Appeals) that the choice of the place of presentation passed to it. Upon its own version, therefore, it was not ready and willing to pay the coupons, even in lawful dollars.

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[42] No allegation at all is made in the amended answer with respect to any readiness, willingness or ability to pay anywhere on the dates of Respondents' demands.

The opposing affidavits are barren of any proof that Petitioner was willing to make even the payments conceded by it to be due, and the typical protests (R. 88-89; R. 89-90) contain no reference to any tender of payment by Petitioner.

Accordingly (without waiving our contention that the judgment below should be affirmed), we respectfully submit that interest was in any event properly assessed against Petitioner.

The rule is stated in *Hamilton* v. *Wheeling Public Service Co.*, 88 W. Va. 573 (1921):

> "With practical uniformity and unanimity the judicial opinion is that such instruments are not mere incidents of the principal debt to which they are attached, but themselves represent separate and distinct contracts for the payment of money when due according to their terms, and, like other promises of a similar character, bear interest after default in payment. 'The manifest purpose in making them was to increase the market value of the bonds by giving assurance of prompt payment of the interest. The intention was to give currency to them as a separate contract, which would carry with them the usual incident of the interest in case of a failure to pay at maturity. * * *.' *Philadelphia etc. R. Co.* v. *Smith*, 105 Pa. 195, 198, 199."

See, also, opinion of Mr. Justice Hofstadter in the "First Action," N. Y. L. J., June 13, 1936, p. 3029, and judgments entered thereon, *which included interest* and which judgments were paid by Petitioner in full, with interest.

It is unnecessary to discuss here the question as to whether or not interest upon interest may be allowed in the absence of a new consideration. Interest is here claimed *by way of damages*. If a suitor were not entitled to interest by way of damages for failure to pay a liquidated amount, an obligor could with impunity refuse to pay any instrument upon the maturity date.

As was said by the Court in *Star Stationery Co.* v. *Rogers*, 88 Fed. (2d) 482 (C. C. A., 3rd, 1937); cert. den. 302 U. S.

691 (1937), quoting from *Curtis* v. *Innerarity*, 6 How. 146, 154 (1848):

> "'Every one who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest *as damages for his non-performance*. Hence it may correctly be said, that such is the implied contract of the parties.'"

The following quotation from the *Curtis* case, just preceding the quotation used by the Court in the *Star Stationery Co.* case, is also pertinent:

> "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest."

It is therefore clear that all Respondents are at all events entitled to interest and costs.

POINT G.

Basic Fallacy of Petitioner's Brief.

One basic fallacy underlies Petitioner's whole brief. It rests its whole case on the statement (p. 46 of its brief) that "* * * the narrow question here presented is whether Congress excepted a particular class of gold bonds."

This misstatement of the issues is based upon a fallacious assumption. Respondents do not contend, and never have contended, that so much of the "bonds" (coupons) as represent "gold" is excepted, or should be excepted, from the Joint Resolution. What Respondents do contend is that in so far as the coupons contain a "gold clause," the obligation contained in the "gold clause" is discharged by payment of an equal amount of lawful money; but in so far as the coupons contain separate and distinct alternative promises to pay in

foreign moneys abroad, exercisable at the option of the holder, the Joint Resolution did not reach, and did not intend to reach, such foreign money alternatives, especially in the hands of foreigners.

Petitioner asserts (p. 29 of its brief) that "respondents are requesting not construction, but amendment of the Resolution." The fact is, of course, that it is Petitioner which is requesting "amendment." Petitioner seeks to read into the Resolution words which are not there,[43] and which never were intended to be there. It utterly ignores the statutory definitions contained within the Joint Resolution itself.[44] It erroneously assumes (p. 28 of its brief) that Respondents seek to be "withdrawn from the application of the Joint Resolution." Respondents take no such position. Insofar as the Joint Resolution applies (i. e., to the "gold clause"), Respondents agree that the coupons are governed thereby; insofar as the Joint Resolution does not apply (i. e., to the promise to pay foreign moneys abroad), the coupons always were, and now are, outside of the scope of the Resolution—whether the problem be approached from the point of view of (a) the actual language employed or (b) the spirit and intent thereof.

Petitioner is thus doing the very thing which it wrongly attributes to Respondents.

Petitioner, furthermore, enunciates a "public policy" which has never been declared and does not exist, and builds its entire case thereon. The short answer to its assumption was made by this Court many years ago, viz.: "What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Haddon* v. *Collector*, 72 U. S. 107, 111 (1866).

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[43] i. e., foreign moneys.

[44] As this Court said in *Fox* v. *Standard Oil Co.*, *supra*, at page 96:

"In such circumstances definition by the average man or even by the ordinary dictionary with its studied shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others."

The proper approach to the construction of the Joint Resolution is set forth in *The Schooner Paulina's Cargo* v. *United States*, 7 Cranch. 34 (1812), where this Court said (at p. 39):

> "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. * * *
>
> "* * * It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described—not to some other case which judges may conjecture to be equally dangerous."

The statutory intent, as expressed in the "explicit terms" of the Joint Resolution itself, cannot be altered in the interest of an intent "imagined" by Petitioner. *United States* v. *Riggs*, 203 U. S. 136 (1906); *Hyde* v. *Shine*, 199 U. S. 62, 78 (1905).

America is an international creditor nation. Congress did not intend to, and in fact did not, enunciate in the Joint Resolution a public policy which would result in repudiation of *international* debts. Assume that a Dutchman purchased in Holland, upon the basis of a Dutch prospectus, bonds which, by their terms, are payable in Holland in the currency of that country. Did Congress intend by the Joint Resolution to impair the right of foreigners to collect foreign moneys abroad? It certainly gave no evidence of any such intention. The answer, therefore, is an emphatic "No."

Petitioner's brief skips lightly over the record and the arguments pertinent to the instant case. It addresses itself principally to No. 384, where, in substantial part, the issues are entirely different from those upon the present appeal (see pp. 13 *et seq.*, *supra*). A reversal by this Court of the Circuit Court of Appeals in No. 384 would settle the multiple currency issues involved in favor of these Respondents; an affirmance in No. 384 would not be controlling, however.

upon the instant case. Insofar, therefore, as Petitioner's brief relates to No. 384, it is in large part irrelevant.

Nothing adduced by Petitioner has impaired or can impair the fact that the Joint Resolution does not apply, and was not intended to apply, to the foreign money alternatives of the multiple currency coupons here sued upon. Neither public policy nor the Joint Resolution condemn the payments here sought. The language of the Joint Resolution itself, in the light of the definitions contained therein, the decided cases, established principles of law, good conscience and equity, all sustain the decision of the Court of Appeals and the position taken by these Respondents.

CONCLUSION.

The judgment appealed from should be affirmed.

Dated, New York, February 4, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

APPENDIX "A."

PUBLIC RESOLUTION—No. 10—73D CONGRESS
[H. J. Res. 192]

48 STAT. 112, TITLE 31, U. S. C. 463.

JOINT RESOLUTION

To Assure Uniform Value to the Coins and Currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect

thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, at 4.40 p. m.